TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 548.

E M. TRAVIS, AS COMPTROLLER OF THE STATE OF NEW YORK, APPELLANT,

vs.

E YALE & TOWNE MANUFACTURING COMPANY.

FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER [illegible], 1919.

(27,303)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 548.

EUGENE M. TRAVIS, AS COMPTROLLER OF THE STATE OF NEW YORK, APPELLANT,

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1919.

District Court of the United States for the Southern District of New York.

The Yale & Towne Manufacturing Company, Complainant,

vs.

Eugene M. Travis, Comptroller of the State of New York, Defendant.

'o the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting as a Court of Equity:

The Yale & Towne Manufacturing Company, a corporation or-anized and existing under and by virtue of the laws of the State of onnecticut, and a citizen of said State of Connecticut, brings this s bill of complaint against Eugene M. Travis, Comptroller of the tate of New York, and a citizen and inhabitant of said State of ew York.

And thereupon your orator complains and says:

1. This is a suit of a civil nature in equity, wherein the matter controversy exceeds, exclusive of interests and costs, the sum or alue of Three thousand Dollars ($3,000), and arises under the Con-titution of the United States.

2. This is a suit in equity authorized by law to be brought to redress the deprivation, under color of a statute, of rights. privileges, and immunities secured by the Constitution of the United States.

3. This is a suit of a civil nature in equity, wherein the matter in ontroversy exceeds, exclusive of interest and costs, the sum or value f Three thousand dollars ($3,000), and is between citizens of dif-rent states.

4. The Legislature of the State of New York enacted, and the overnor of the State of New York approved, on May 14, 1919, a atute entitled "Chapter 627 of the Laws of 1919," relating to a tax pon personal income, a copy of which act is attached hereto and ade a part hereof, and included in pages 26 to 44 of the pamphlet nexed and marked "Exhibit A."

5. The defendant, purporting to act under the authority of said atute, has made certain rules and regulations and forms relating ereto, copies of which are attached hereto and made a part hereof. d are included in pages 1 to 26 of the pamphlet annexed and arked "Exhibit A," and in the pamphlet annexed and marked Exhibit B," and in the form annexed and marked "Exhibit C."

6. Your orator is a corporation specially chartered under the laws of the State of Connecticut, having its principal place of business and its home office and its manufacturing plant in the City of Stamford, in said State, and is engaged extensively in manufacture and in the sale of its product in interstate commerce and in commerce between the United States and foreign nations. Your orator is authorized to transact its business in the State of New York and maintains an office for the transaction of its business in the City of New York, in said State, where it owns and possesses real and personal property. In the conduct of its business your orator employs
c a large number of persons, many of whom are non-residents of the State of New York as defined in the statute hereto annexed, who are occupied in whole or in part in the business of your orator within the State of New York, the said employes being generally classified as follows:

(*a*) Your orator employs a certain number of persons who reside in the State of Connecticut and are citizens of said State, whose services to your orator are substantially all performed at your orator's office in the City of New York, State of New York, and whose salary is paid to them at stipulated times and in stipulated amounts in the City of New York from funds belonging to your orator within the State of New York.

(*b*) Your orator employs a certain number of persons who reside in the State of New Jersey and are citizens of said State, whose services to your orator are substantially all performed at your orator's office in the City of New York, State of New York, and whose salary is paid to them at stipulated times and in stipulated amounts in the City of New York from funds belonging to your orator within the State of New York.

(*c*) Your orator employs a certain number of persons who reside in the State of Connecticut and are citizens of said State, whose services to your orator are substantially all performed at your orator's office in the City of New York, State of New York, and whose salary is paid to them in checks drawn by your orator at your orator's office in Stamford, Connecticut, and deposited in the mails directed to the employes and received by them in the City of New York.

d (*d*) Your orator employs a certain number of persons residing in the State of Connecticut and citizens of said State, whose services to your orator are rendered partly in the State of New York and partly in the State of Connecticut, some of the service being rendered at the office of your orator in the City of Stamford, and other services being rendered at the office of your orator in the State of New York, said employes being paid by checks of your orator delivered to the employes at Stamford, Connecticut. Of the said employes who are partly occupied in the State of New York and partly without the State of New York, some of them spend most of their working time and are chiefly occupied upon the plaintiff's business in Stamford, Connecticut, and spend

a relatively small part of their working time in the State of New York; and others spend a relatively large part of their working time in the State of New York, and a relatively small part in the State of Connecticut. In the case of such employes the actual proportion of time spent in the State of New York and in the State of Connecticut is not defined or accurately predetermined, the employe spending his time wherever it is for the best interest of the work that he is doing for your orator.

(*e*) Your orator also employs certain persons residing in Connecticut and in New Jersey and citizens of said States, respectively, who are engaged in rendering services to your orator as traveling salesmen and the like, who spend a portion of their time in New York and a portion of their time traveling through various other states. These salesmen are paid by check drawn by your orator and mailed to the employe, sometimes in the State of New York and sometimes in other states outside of the State of New
e York, the checks being mailed sometimes from your orator's office in the State of New York, and sometimes mailed from your orator's office in Stamford, State of Connecticut.

7. The persons residing outside of the State of New York, and citizens of states other than New York, who are occupied in the conduct of your orator's business either all or a portion of their working time in the State of New York, and whose annual salaries or fixed compensation exceed $1,000 a year, exceed in number fifty (50); and their total annual salary or compensation exceeds Two hundred thousand dollars ($200,000). The amount of the tax required by the statute of the State of New York hereinafter set forth to be withheld by your orator from the salaries of said employes residing outside of the State of New York exceeds the sum of Three thousand dollars ($3,000) per annum. The amount of expense to which your orator would be put annually in withholding a percentage of the salaries of said employes as required by said statute would exceed the sum of One thousand dollars (1,000).

8. Most of the persons employed by your orator as aforesaid are engaged by your orator under term contracts, whereby your orator has agreed to pay to them a fixed and stipulated wage or salary for a stipulated time or term; and all of said employes receive salaries and wages constituting fixed and determinable annual or periodical compensation specified in Section 366 of the statute aforesaid.

9. The defendant is a citizen of the State of New York, and is the Comptroller of the State of New York, and as such Comptroller threatens to enforce the provisions of said statute against your orator, and requires your orator to deduct and withhold from the
f salaries and wages payable to its said employes residing in the States of Connecticut and New Jersey, and citizens of said states, respectively, and engaged in whole or in part in the business of your orator in the State of New York, the taxes stipulated and provided in Section 366 of the statute aforesaid, and threatens to

enforce against your orator the penalties provided in Section 376 of the statute if it shall fail and refuse to withhold the sums aforesaid, and to make the returns and to pay the same to the defendant in accordance with the provisions of the statute.

10. The said statute of the State of New York aforesaid is illegal and unconstitutional, and is in particular contrary to and in violation of the guarantees and provisions of the Constitution of the United States as follows: to wit, it is contrary to and in violation of Article 1, Section 8 of said Constitution in that it interferes with and directly burdens commerce between the different states; it is contrary to and in violation of Article 1, Section 10 of said Constitution in that it impairs the obligation of contracts between your orator and its employes; it is contrary to and in violation of section 2 of Article 4 of said Constitution in that it deprives the citizens of the States of Connecticut and New Jersey of the privileges and immunities enjoyed by the citizens of the State of New York; it is in violation of the Fourteenth Amendment to said Constitution in that it abridges the privileges and immunities of citizens of the United States residing in and citizens of Connecticut and New Jersey and states other than the State of New York, and in that it deprives your orator and its said employes of their property without due process of law and denies to them equal protection of the laws.

g 11. By reason of the aforesaid threats of the defendant to enforce the said law against your orator, and require it to withhold the said sums of money, portions of the salaries due by it to its employes, your orator is threatened with great and irreparable injury which it cannot be adequately compensated for at law, in that if it withholds the said sums of money as required by the defendant, it will be put to great and continuing expense in determining amounts to be withheld and rearranging its accounting, and its employes can compel it to reimburse them for such sums so withheld; and your orator, having paid such sums to the defendant, cannot recover the same back at all, or, in any event, only after separate litigations as to each sum withheld as to each employe, involving it in great expense in law suits, and in multifarious and vexatious litigations.

And, in order that your orator and its property may be protected against the unlawful and unjustifiable threatened acts and actions of the defendant, your orator respectfully prays:

(1.) That process of subpœna issue herein directed to the defendant, Eugene M. Travis, as Comptroller of the State of New York, directing him to appear and answer the allegations herein contained, but not under oath, an answer under oath being hereby expressly waived.

(2.) That an injunction issue herein perpetually enjoining the said defendant, Eugene M. Travis, as Comptroller, his clerks, attorneys, agents, and all other persons claiming or holding through

or under him, or acting under his instructions, from in any form or manner whatsoever requiring your orator to deduct or withhold from the salaries, wages, and other fixed and determinable annual or periodical compensation earned by its employes residing in the State of Connecticut, or in the State of New Jersey, or in any other state outside of the State of New York, and engaged wholly in the performance of services in the State of New York, any income tax claimed to be due from such employes to the State of New York on account of said services.

(3.) That an injunction issue herein perpetually enjoining the said defendant, Eugene M. Travis, as Comptroller, his clerks, attorneys, agents, and all other persons claiming or holding through or under him, or acting under his instructions, from in any form or manner whatsoever requiring your orator to deduct or withhold from the salaries, wages, and other fixed and determinable annual or periodical compensation earned by its employes residing in the state of Connecticut, or the State of New Jersey, or in any other state outside of the State of New York, and engaged partly in the performance of services in the State of New York, and partly in the performance of services without the State of New York, any income tax claimed to be due from such employe to the State of New York on account of said services.

(4.) That an injunction issue herein perpetually enjoining the said defendant, Eugene M. Travis, as Comptroller, his clerks, attorneys, agents and all other persons claiming or holding through or under him, or acting under his instructions, from in any form or manner whatsoever requiring your orator to make a return to the defendant of information concerning the amount of salaries, wages, and other fixed or determinable gains or income paid by it to any of its aforesaid employes engaged wholly or in part in rendering services in the State of New York, and residing outside of the State of New York.

(5.) That an injunction issue herein perpetually enjoining the said defendant, Eugene M. Travis, as Comptroller, his clerks, attorneys, agents, and all other persons claiming or holding through or under him, or acting under his instructions, from requiring your orator to pay to the defendant as a tax due from said nonresidents or any of them any sum whatsoever.

(6.) That an injunction issue herein perpetually enjoining the said defendant, Eugene M. Travis, as Comptroller, his clerks, attorneys, agents and all other persons claiming or holding through or under him, or acting under his instructions, from instituting any proceeding or filing any complaint against your orator because of its failure to make, sign, or verify a return of the salaries and wages and other income paid by it to persons in its employ, and residing in the states of Connecticut or New Jersey, or elsewhere, without the State of New York, or from instituting any proceeding at law or at equity against your orator for the recovery of pen-

alties or otherwise for its failure to withhold such amounts from the wages and salaries due to its non-resident employes, and to make and file a return thereof to this defendant, as required by the provisions of said law.

(7.) That a restraining order or preliminary injunction be issued without delay directed to the said defendant, Eugene M. Travis, as Comptroller, enjoining and restraining him as set forth in the five preceding paragraphs.

(8.) For such other and further relief as upon the facts as they shall be made to appear may be just and reasonable.

ARCHIBALD COX,
Solicitor for Complainant.

LOUIS H. PORTER,
Counsel for Complainant.

j State of New York,
County of New York, ss:

John H. Towne, being duly sworn deposes and says, that he is the Secretary of The Yale & Towne Manufacturing Company, the complainant herein; that he has read the foregoing Bill of Complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and that as to those matters he believes it to be true. That the reason why this verification is not made by the complainant in person is because complainant is a corporation, and deponent is an officer thereof, to wit, the secretary.

JOHN H. TOWNE.

Sworn to before me this 1st day of July, 1919.
(Sgd.) JEANE VOLLENHOVER,
Notary Public, New York County, No. 28.

Register's No. 10,004.
Term expires March 30, 1920.

STATE OF NEW YORK

The A, B, C

OF THE

Personal Income Tax Law

BY

EUGENE M. TRAVIS
State Comptroller

JUNE, 1919

BULLETIN No. 1

ALBANY
J. B. LYON COMPANY, PRINTERS
1919

FOREWORD

New York state has adopted the plan of taxing individuals on their incomes. The bill establishing the system became a law on May 14, 1919. It is now operative and affects residents and nonresidents of the state.

It is realized that individuals differed in their opinions respecting the merits or demerits of this new plan of taxation, but now that the law is a fact personal views should be submerged in an honest endeavor to comply with legal requirements.

The duty of administering the act is imposed on the comptroller. I shall strive to execute the powers conferred according to the purposes and the intent of the act and in a manner fair alike to the state and to the individuals affected thereby. In that effort I am hopeful of having the earnest and hearty co-operation of all citizens.

This act is of such importance that immediate and accurate information respecting its provisions should be made available for the great body of taxpayers affected thereby. It is for that reason that this bulletin is being published. Later, when rules and regulations have been formulated and adopted, a second bulletin will be published. It is thought that the information contained in this pamphlet is accurate but closer study of the law and rules and regulations when established, may require the amplification or the modification of some of the answers herein given. If that be the case, all such changes will be noted in future bulletins.

Eugene M. Travis

State Comptroller.

ALBANY, N. Y., MAY 29, 1919.

NOTE

This is the first of a series of bulletins. Subjects not covered and questions not answered herein will be cared for in publications hereafter issued and by the rules and regulations of the comptroller when promulgated.

THE LAW

1. What is the income tax law?

It is article 16 of the tax law, added by chapter 627, laws of 1919.

2. What is its purpose and intent?

The obvious purpose and intent of the law is that, commencing with 1919, all gains, profits and income of residents, from all sources, and of nonresidents, from sources within the state, shall be charged and assessed, unless expressly exempted, with an income tax at progressive rates, and that such tax shall be paid by the owner of such income or by the proper representative thereof having the receipt, custody, control or disposal of the same.

THE TAX

3. What are the rates of tax?

The tax is imposed at graduated rates: 1 per cent on the first $10,000 of taxable income, 2 per cent on the next $40,000, and 3 per cent on taxable income in excess of $50,000.

4. Are any surtaxes imposed?

No.

5. Does the state income tax law resemble titles I and II of the federal revenue act of 1918?

Yes; in respect of individuals, it conforms closely to them. Many provisions of the state act are identical with those contained in the federal statute.

6. Is one's entire income taxed?

No. Put simply, the law provides that to arrive at the amount of " taxable income " one

(a) need not include income of certain characters (see answers 39 and 41) in computing " gross income " ;

(b) may subtract from " gross income " certain deductions (see answers 42 and 44) to arrive at " net income " ;

(c) is allowed, if a resident, personal exemption according to status (see answer 49), as a deduction from " net income ", in calculating " taxable income " (an exception to this rule is stated in answer 49);

(d) is allowed, under certain conditions, if a nonresident, credit for a ratable portion of income taxes paid to the state or country of his residence (see answer 51).

7. When is the first tax payable?

On or before March 15, 1920, in respect of income of 1919.

8. Where and to whom is it to be paid?

To the state comptroller, at his offices in Albany and New York city, unless the state is districted and branch offices established. (This question will be more fully answered in a bulletin to be published later when plans are fully worked out.)

9. Can remittances be made through the mail?

Yes; that plan is preferable. (The instructions which will accompany return blanks will cover this point.)

10. Should the remittance accompany the return?

Yes. (Section 377)

11. Is it legal to contract to pay another's income tax?

No. It is unlawful for any person to agree or contract, directly or indirectly, to pay or assume or bear the burden of any tax payable by a taxpayer under this law. Any such contract is null and void and incapable of enforcement by any court. (Section 385). This does not apply to the withholding of the tax in whole or in part, by a withholding agent, in the case of a nonresident. (Section 366)

12. Is the income tax a substitute for some other tax?

Yes; to a limited extent. It is provided that after July 31, 1919, no personal property assessment shall be made on any assessment-roll of a city, town, village, school or other special tax district on account of the following, if the income therefrom be subject to the tax imposed by the income tax law:

(a) Money on hand, on deposit or at interest

(b) Bonds, notes and choses in action, and

(c) Shares of stock in corporations other than banks and banking associations

if such be owned by any individual or constitute a part of a trust or estate subject to the income tax. Otherwise, the income tax is in addition to all other taxes imposed by law. (Section 352)

The proper construction of this section seems to be that individuals may and should be assessed on account of intangibles, of the characters mentioned above as personal property, in all tax districts where the assessments are required by law to be made prior to July 31, 1919, but that thereafter no personal property assessments can be based thereon.

13. May a valid tax be levied on such an assessment on or after August 1, 1919?

Yes. The proper construction of section 352 of the tax law and of section 3 of article 16 thereof seems to be that if a

valid personal property assessment, of the character described in the last preceding answer, is made prior to August 1, 1919, a valid tax may be levied thereon after that date.

14. How are the taxes collected by the comptroller to be applied?

The comptroller is required (a) to retain a fund of $250,000 from which to pay refunds and abatements to taxpayers; (b) of the remainder, 50 per cent is to be paid into the treasury of the state and used for and applied to state uses and purposes; (c) the remaining 50 per cent is to be apportioned periodically, — at least once in three months — by the comptroller, and paid to the treasurers of the several counties of the state in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. In the case of counties included in the city of New York, payments shall be made to the receiver of taxes of such city. (Section 382)

15. How will the portion paid to a county treasurer outside of Greater New York be applied?

The county treasurer of each county is required to apportion the amount received among the several towns and cities within the county in the proportion that the assessed valuation of real property of each town or city bears to the aggregate assessed valuation of the real property of the county. In the case of a city, he shall pay the amount apportioned to its chief fiscal officer to be used for general city purposes. In the case of a town, he shall credit the amount apportioned against the county tax payable by a town. If the amount apportioned exceeds the town's share of the county tax, the excess shall be paid to the supervisor to be applied to general town uses and purposes. In the case of the city of New York, the shares of the several counties wholly contained within the city shall be paid into the general fund for the reduction of taxation of the city.

PERSONS TAXED

16. Who is an income taxpayer?

Any person, trust or estate who or which is subject to, or whose income is, in whole or in part, subject to a tax imposed by article 16 of the tax law.

17. Upon whom or the incomes of whom is a tax imposed?

A tax is imposed in respect of the incomes of (a) residents and (b) nonresidents.

18. Who is a resident?

A natural person, not a transient, is a resident of the state for purposes of the income tax. Whether or not one is a transient is determined by his intentions with regard to his

stay. A person who becomes a resident of the state at any time before March 15 of the next succeeding calendar year is a resident of the state for the calendar year for purposes of the income tax. (Section 350, subdivision 7)

19. Who is a nonresident?

A person is a nonresident, within the meaning of the act, if he receives taxable income from property owned or from a business, trade, profession or occupation carried on in the state but is not a resident thereof.

20. Is an alien taxable under this act?

Yes; accordingly as the tax is imposed on him if a resident, or upon his income if a nonresident.

21. Is a corporation taxable under this law?

No. A corporation is taxable under other provisions of law.

22. May a minor be a taxpayer?

Yes. A minor, as such, is not exempt.

23. Is a partnership liable to a tax ?

No, but the members of the partnership are, as individuals. The law, in effect, ignores the partnership's existence as an independent entity and imposes no tax against it, but each individual member of a partnership is taxed on his share of the partnership's " net income ", whether distributed or not. (Section 364)

24. Who is a " fiduciary " ?

An individual or corporation acting in a fiduciary capacity for any person, trust or estate; as, for instance, a guardian, trustee, executor, administrator, receiver or conservator. (Section 350, subdivision 5)

25. Is a fiduciary a taxpayer?

Technically, no; practically speaking, yes, because a fiduciary is responsible for the payment of the tax imposed on the income received by certain estates or trusts (section 365). (See answers 41 and 42.)

YEAR — TAXABLE AND FISCAL

26. What is a taxable year?

The words " taxable year " mean the calendar year or the fiscal year upon the basis of which " net income " is computed. (Section 350, subdivision 4)

27. **What is a fiscal year?**

The words "fiscal year" mean an accounting period of twelve months, ending on the last day of any month other than December. (Section 350, subdivision 4)

27a. **What is the first taxable year?**

The calendar year 1919, or that part of a fiscal year ending in 1919, between January 1, 1919, and the end of such fiscal year.

28. **Must one return income for a calendar year?**

No; in reporting income of 1919, one may elect whether to report for the calendar year or for a fiscal year ending during such calendar year. This statement is subject to the following qualifications: (1) That "net income" must be computed upon the basis of the taxpayer's annual accounting period. (2) If his annual accounting period is other than a fiscal year, as defined, or if he has no accounting period or does not keep books, then "net income" must be computed on the basis of the calendar year. (Section 358). The return should be made for the same accounting period as that used for the federal return, if such basis clearly reflects income.

29. **If one reports income for a "fiscal year" ending during 1919, is a tax imposed on the "net income" for the entire fiscal year?**

No. It is said in section 351:

> "Such tax shall first be levied, collected and paid in the year 1920 upon and with respect to the taxable income for the calendar year 1919, or for any taxable year ending during the year 1919",

but that statement must be construed in conjunction with the the following quotation from section 370:

> "If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year, he shall make a separate return for the period between the begining of a calendar year in which such fiscal year ends and the end of such fiscal year.
>
> "In all of the above cases the net income shall be computed on the basis of such period for which separate return is made and the tax shall be paid thereon at the rate for the calendar year in which such period is included."

The taxpayer who keeps his accounts by a fiscal year, as defined, will, in 1920, for 1919, unless he elects to change to the calendar year, file two returns with the comptroller, one for the fiscal year, and one for the period commenced January 1, 1919, and ended on the date of the ending of his fiscal year. The two returns are needed in the first year because of the

necessity of having the income and expenses of the entire year in order to determine the taxable income for the portion of the year. His tax will be calculated on the " net income " disclosed by the report for the shorter period.

30. If one reports in the first instance according to the calendar year, may he later change to a fiscal year?

Yes, if he first obtains the consent of the comptroller.

31 If one reports in the first instance for a fiscal year, may he later change to the calendar year?

Yes, if he first obtains the consent of the comptroller.

32. If one is a member of a partnership and calculates his " net income " upon the basis of a period different from that upon the basis of which the " net income " of the partnership is computed, what must he return as his share of the " net income " of the partnership?

He is required to return his distributive share of the " net income " of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which his " net income " is computed. (Section 364)

33. Is that true of 1919 income returns?

This question will be more fully answered by rules and regulations hereafter promulgated. Quite likely in such a case the individual will be required to include in his return only his distributive share of the " net income " of the partnership earned after January 1, 1919, and before the end of the partnership's fiscal year.

INCOME — GROSS, NET AND TAXABLE

34. What is income?

Income, in a broad, general way, means all wealth which flows into a taxpayer other than as a mere return of capital. It includes " gains and profits ", including gains derived from the sale, exchange or other disposition of capital assets. It is not limited to cash alone. The statute recognizes as income-determining factors other items, among which are inventories, accounts receivable, property exhaustion and accounts payable for expenses incurred.

35. What is " gross income "?

" Gross income " means income in the broad sense, less such items thereof as are specifically exempted by statutory provisions.

36. What is "net income "?

That which remains of " gross income " after subtracting the deductions allowed by law, is " net income ".

37. What is " taxable income "?

" Taxable income " is what remains of " net income " after deducting the personal exemption, if any, allowed by section 362, or the credit, if any, granted by section 363. It is the base upon which the income tax is calculated.

38. Does " gross income " have the same meaning with reference to both residents and non-residents?

No. In general, with reference to residents, it means income from all sources within and without the State, and, as applied to non-residents, it means income from all sources within the State only.

39. What constitutes the " gross income " of a resident?

It is the total of every item of income derived from all sources whatever except those enumerated in paragraphs " f " to " n " of this answer, received or accrued during the taxable year for which a return is rendered, whether in cash or its equivalent. It includes gains, profits and income derived:

(a) From salaries, wages or compensation for personal service, of whatever kind and in whatever form paid.

(b) From professions, vocations, trades, businesses, commerce, sales, dealings in property, whether real or personal growing out of the ownership or use of or interest in such property.

(c) From interest, rent, dividends, securities.

(d) From the transaction of any business carried on for gain or profit.

(e) From any other source whatever.

It excludes the following items, which are exempt:

(f) Proceeds of life insurance policies paid upon the death of the insured to individual beneficiaries or to the estate of the insured. (Section 359, subdivision 2, paragraph " a ")

(g) Amounts received as a return of premium or premiums, by the insured under life insurance, endowment or annuity contracts. (Section 359, subdivision 2, paragraph " b ")

(h) Amounts received for personal injuries or sickness, through accident or health insurance or under workmen's compensation acts. (Section 359, subdivision 2, paragraph " e ")

(i) Damages received, whether by suit or agreement on account of injuries or sickness, or through the war risk insurance act or any law providing relief for injured or disabled members of the federal military or naval forces. (Section 359, subdivision 2, paragraph " e ")

(j) Gifts, bequests and devises; but income from these is not exempt. (Section 359, subdivision 2, paragraph " e ")

(k) Compensation received from the United States by officials or employes thereof, including persons in the military or naval forces. (Section 359, subdivision 2. paragraph " f "). Seemingly, this includes, also, persons in the employ of railroads under federal control so long as they remain under such control.

(l) Interest upon (1) obligations of the United States or its possessions, (2) securities issued under the farm loan act of July 17, 1916, or (3) by the war finance corporation, and (4) obligations of the State of New York and of the municipal corporations or political subdivisions thereof. (Section 359, subdivision 2, paragraph " d ")

(m) Interest on investments upon which the investment tax has been paid since June 1, 1917, under section 331 of the tax law, for the years for which such tax shall have been paid. (Section 359, subdivision 2, paragraph " d ")

(n) Income received by officers of certain religious, benevolent, educational, scientific and eleemosynary denominations or institutions, and cemetery associations, if used exclusively for carrying out such purposes. (Section 359, subdivision 2, paragraph " g ")

40. In what respects does the federal definition of " gross income " (a) agree with and (b) differ from that contained in the State law?

(a) It agrees with the state definition in respect of paragraphs " b ", " c ", " d ", " e ", " f ", " g ", " h ", " i ", and " j " of the last preceding answer.

(b) It differs from the state definition in the following main respects:

1. With reference to paragraphs " a " and " k " the federal act includes in " gross income " the compensation received by federal officers and employes, and so much of the salary or compensation received during the present war for active service by a person in the military or naval forces of the United States as exceeds $3,500. Furthermore, under the federal statute, the commissioner of internal revenue has determined (article 71, regulation 45; treasury decision 2843) that compensation paid its officers and employes by a state or political subdivision thereof is not taxable. As has been seen, the state act expressly exempts compensation received from the United States by federal officers and employes, and of persons in the military or naval forces of the United States. On the other hand, it does not exempt compensation of state and municipal officers and employes, nor has the comptroller the power to promulgate a regulation exempting such income.

2. The provision of the federal act corresponding with paragraph "l" of the last preceding answer exempts the obligations of the United States or its possessions and bonds issued by the war finance corporation, but provides. in relation to obligations of the United States issued after September 1, 1917, and in relation to bonds issued by the war Finance Corporation, that the interest shall be exempt only if and to the extent provided in the respective acts authorizing the issue thereof, as amended and supplemented. The state law exempts entirely the interest from those securities. On the other hand, the federal statute exempts interest upon the obligations of all states, territories, or political subdivisions thereof, or the District of Columbia, while the state act exempts only interest on the obligations of the state of New York and the municipal corporations or political subdivisions thereof.

3. The exemption enumerated in paragraph "m" of the last preceding answer is original in the state law. No similar or substantially similar exemptions are found in the federal statute.

4. The federal act contains an exemption analogous to "n" of the last preceding answer, as will be found upon examination of section 231 of the federal statute.

5. The federal act does contain other specific exemptions of income, as, for instance, the income of foreign governments and income accruing to states, territories, etc., which are not paralleled in the state law, but, as the state income tax is imposed only in respect of natural persons, resident or non-resident, and estates and trusts, these differences appear immaterial.

41. What different meaning does "gross income" have as to a non-resident?

In the case of a non-resident, "gross income" has substantially the same meaning as in the case of a resident, except that income from sources without the state is excluded. Neither does it include annuities, interest on bank deposits, bonds, notes or other interest-bearing obligations, and dividends from corporations, except to the extent which such income shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this law. (Section 359, subdivision 3)

42. What items may a resident deduct from "gross income" to ascertain "net income" from all sources?

In arriving at "net income", a resident may deduct from "gross income" the following items:

(a) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade

or business, including reasonable compensation for personal services actually rendered, and certain rentals. (Section 360, subdivision 1)

(b) Such proportion of the total interest paid or accrued during the taxable year on indebtedness as his " net income " from all sources bears to his total income from all sources. (Section 360, subdivision 2)

(c) Losses sustained, if incurred in trade or business during the taxable year, and not compensated for by insurance or otherwise. (Section 360, subdivision 4)

(d) Losses sustained in any transaction entered into for profit though not connected with a trade or business, if not compensated for by insurance or otherwise. (Section 360, subdivision 5)

(e) Losses sustained during the taxable year of property not connected with the trade or business, if arising from fires, storms, shipwrecks or other casualty, or from theft, and not compensated for by insurance or otherwise. (Section 360, subdivision 6)

(f) Debts ascertained to be worthless and charged off within the taxable year. (Section 360, subdivision 7)

(g) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. (Section 360, subdivision 8)

(h) Taxes other than income taxes, paid or accrued within the taxable year, imposed (1) by authority of the United States or of any of its possessions, (2) by authority of any state or territory, or municipality or taxing subdivision thereof, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, and (3) by authority of any foreign government. (Section 360, subdivision 3)

(i) In general, in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements in the manner provided by law and according to rules and regulations to be established by the comptroller. (Section 360, subdivision 9)

(j) Contributions or gifts, not in excess of 15 per cent of the taxpayer's " net income " as computed without the benefit of this deduction, made within the taxable year, to corporations or associations incorporated or organized under the laws of this state and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation

authorized by section 7 of the act of congress, known as the vocational rehabilitation act. This deduction to be allowed only if verified under rules and regulations prescribed by the comptroller. (Section 360, subdivision 10)

43. In respect of residents, do the foregoing deductions differ from those allowed by the federal statute? If so, to what extent?

Yes, to some extent.

The deductions enumerated in paragraphs " a ", " f " and " g " are allowed by both acts.

With reference to paragraph " b ", the state deduction is on the basis stated above. The corresponding federal provision reads as follows:

> " All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States, issued after September 24, 1917), the interest upon which is wholly exempt from taxation under this title as income to the taxpayer * * "

While the language of the state statute, stated in paragraphs " c ", " d " and " e " is identical with that contained in the federal act, the basis for determining such losses in the case of property acquired prior to January 1, 1919, will be the fair market value as of that date. In that respect, the determination of such losses differs from the determination under the federal law.

In relation to paragraph " h ", the corresponding federal provision authorizes the allowance as a credit, to a citizen, any income war profits and excess profits taxes paid during the taxable year to any foreign country upon income derived from sources therein or to any possession of the United States, and, to a resident of the United States, any such taxes paid during the taxable year to any possession of the United States. The state statute does not permit those deductions. Furthermore, the federal act permits the taxpayer to deduct all taxes paid or accrued within a taxable year or imposed by the authority of any state or territory, or any municipal or taxable subdivision of any state or territory. The state law limits the deduction to " taxes other than income taxes ".

The wording of the deduction stated in paragraph "i ", in the state law, is identical with that contained in the federal statute, except that January 1, 1919, is substituted for March 1, 1913. This will require the fixing of a fair market value of properties developed or existing on January 1, 1919, as of that date rather than as of March 1, 1913, as specified in the federal act.

With reference to the deduction specified in paragraph " j ", the federal statute permits the taxpayer to deduct contri-

butions or gifts to corporations organized and operated exclusively for religious, charitable, scientific or educational purposes or for the prevention of cruelty to children or animals, etc., without restriction as to the place of incorporation, whereas the New York statute restricts such deductible contributions to those corporations only which are incorporated by or organized under the laws of New York State. This applies alike to residents and non-residents.

44. In what respects, if any, do the deductions allowed non-residents differ from those allowed residents, as stated in answer 42?

They differ fundamentally in that they are allowed only " if, and to the extent that, they are connected with income arising from sources within the state ". Subject to that qualification, non-residents are entitled to deductions enumerated in paragraphs " a ", " c ", " f ", " g ", " h " and " i ".

The provision corresponding to paragraph " b " in answer 42, allows a non-resident to deduct the proportion of interest paid or accrued within the taxable year on indebtedness, which the amount of "gross income " from sources within the state bears to the taxpayer's " gross income " from all sources within and without the state.

The deductions stated in paragraphs " d " and " e " are allowed non-residents only in respect of transactions or of property within the state.

Deduction " j " is identical for residents and non-residents.

45. What items of expense are named in the law as non-deductible in calculating that income?

It is specifically provided in section 361 that no deduction shall be allowed in respect of (a) personal, living or family expenses; (b) any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate; (c) any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; (d) premiums paid on any life insurance policy covering the life of any officer, employe or person financially interested in any trade or business carried on by the taxpayer, if the taxpayer is directly or indirectly a beneficiary under such policy. (Section 361)

46. How is the " net income " of a partnership to be computed?

It is to be computed in the same manner and on the same basis as is provided for computing the " net income " of individuals, except that the deduction provided in subdivision 10 of section 360 (See question 42 " j ") is not allowable, and the personal exemptions stated in section 362 shall be allowed only to the individual partners. (Section 364)

47. How shall the "net income" of an estate or trust be computed?

It shall be calculated on the same basis as that provided for individual taxpayers, except that there shall also be allowed as a deduction any part of the "gross income" which, pursuant to the terms of the will or deed creating the trust, is, during the taxable year, paid to or permanently set aside for (a) the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, and (b) any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, if no part of the net earnings of such corporation or association inures to the benefit of any private stockholder or individual. (Section 365, subdivision 2)

48. To what allowable deductions and exemptions are estates and trusts entitled?

For the purpose of taxation, the income of estates and trusts may be divided into the following classes:

(1) Income received by estates of deceased persons during the period of administration or settlement;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests;

(3) Income held for future distribution under the terms of a will or trust;

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals;

(5) Income collected by the guardian of an infant to be held or distributed as the court may direct;

(6) Income of the estate of any deceased person which, during the period of administration or settlement, is properly paid or credited to any legatee, heir or other beneficiary.

An estate or trust falling within the first three classes enumerated above is taxed as an entity and the tax must be paid directly by the fiduciary. In such a case, there is allowed in determining "net income" of the estate of any deceased person during the period of administration or settlement, the amount of income properly paid or credited to any legatee, heir or other beneficiary, which income is taxable directly to the beneficiary, see (6) above and, as an exemption, the personal exemption provided for a single person.

In case of an estate or trust falling within classes four, five and six, the income is required to be reported in the return of the beneficiary taxpayer and the tax paid directly by him or it.

EXEMPTIONS

49. What personal exemptions are allowed resident taxpayers in calculating taxable income?

For the purpose of allowing personal exemptions, resident taxpayers are divided into two classes: (a) single persons and married persons not living with husbands or wives, who are not the heads of families, and (b) single persons and married persons not living with husbands or wives, who are the heads of families, and married persons who live with husbands or wives.

To a person in the first class, an exemption of $1,000 is allowed. A person in the second class is entitled to an exemption of $2,000, but a husband and wife living together may have but one exemption. In both cases an additional $200 for each dependent, other than husband or wife, if such dependent is under eighteen years of age or is incapable of self-support because mentally or physically defective, is allowed. The only exception to this rule is that a taxpayer receiving salary, wages or other compensation from the United States as an official thereof is entitled to only so much of the personal exemption as is in excess of the aggregate amount of such salary, wages or other compensation. (Section 362)

50. Are the personal exemptions stated in the last preceding answer allowed non-resident taxpayers?

No.

51. Is a non-resident taxpayer allowed any exemption or credit deduction from " net income " in calculating " taxable income "?

Yes. While such a taxpayer is not entitled to the personal exemption stated in answer 49, if he becomes liable to income tax to the state or country of his residence upon his " net income " for the taxable year derived from sources within this state, he will be credited on his New York state income tax with such proportion of income tax paid by him to the state or country of his residence as his income subject to taxation under the law of this state bears to his entire income upon which the tax is payable to the state or country of his residence, if the laws of that state or country grant a substantially similar credit to residents of this state subject to income tax under its laws.

52. May a partnership claim for the individual partners the personal exemptions stated in answer 49?

No; those exemptions may be allowed only to the individual partners upon their returns.

53. Are the personal exemptions enumerated in answer 49 ever allowed an estate or trust?

Yes; the exemption granted a single person is allowed in that class of cases in which a trust or estate is taxed as an entity, as stated in subdivision 3 of section 365. (Answer 48)

METHOD OF CALCULATING INCOME, GAIN AND LOSS

54. May a taxpayer calculate income according to the method of accounting regularly employed in keeping his books?

Yes; he must return his income in accordance with his books, subject to the authority of the comptroller to require another method if, in his judgment, the books do not clearly reflect income. If he keeps no books, the comptroller determines the method of computing income.

55. If it does not clearly reflect income or if no books are kept, how shall income be calculated?

It shall be calculated upon such basis and in such manner as, in the opinion of the comptroller, clearly reflects income. (Section 358) Rules and regulations to be promulgated will more fully answer this question.

56. How should one ascertain gain or loss sustained from the sale of property?

For the purpose of calculating gain or loss in respect of property, all property is allocated to two classes: (a) that owned on January 1, 1919, or (b) that acquired on or after that date. In the case of property acquired before January 1, 1919, the taxpayer will use as a basis the fair market price or value as of January 1, 1919, whereas in respect of property acquired on or after that date, he will use as a basis the cost thereof or the inventory value, if the inventory is made upon the basis prescribed by the comptroller. (Section 353)

57. When property is exchanged for other property, how shall gain or loss be determined?

If property, other than stock or securities exchanged in connection with a reorganization, merger or consolidation of a corporation, is received in exchange for other property, it shall, for the purpose of determining gain or loss, be treated as the equivalent of cash to the amount of its fair market value. (Section 354)

58. What about gain or loss on exchanges of stock or securities in connection with a reorganization, merger or consolidation of a corporation?

(a) In such a transaction, if the taxpayer receives new stock or securities of no greater aggregate par or face value,

no gain or loss shall be deemed to occur from the exchange. (Section 354) (b) If the taxpayer receives new stock or securities of an aggregate par or face value in excess of the aggregate par or face value of the stock or securities exchanged, the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost of the stock or securities exchanged, if acquired on or after January 1, 1919, or its fair market price or value as of January 1, 1919, if acquired before that date. (Section 355)

59. May inventories be used?

Yes; whenever in the opinion of the comptroller they are necessary in order to clearly determine the taxpayer's income.

It is conditioned that inventories shall be taken upon such bases as the comptroller may prescribe, (a) conforming as nearly as may be to the best accounting practice in the trade or business, (b) most clearly reflecting income and (c) conforming as nearly as practicable to the forms and methods prescribed by the commissioner of internal revenue. (Section 356)

FIDUCIARIES

60. Does the state law resemble the federal statute in its application to estates and trusts?

Yes, very closely. If one keeps in mind the difference in geographical area affected by the two statutes and that the federal act divides individual taxpayers into two classes, (1) citizens and alien residents, and (2) nonresidents aliens, while the state law allocates them to two classes in respect of residence within the state,— that is, (1) residents and (2) nonresidents — it will be found that the statutes are, otherwise, alsmost identical in wording.

For a definition of "fiduciary", see answer 24.

In relation to " gross ", " net " and " taxable income ", see answers 34 to 48.

In relation to " returns ", see answers 85, 86 and 97.

WITHHOLDING AGENTS

61. Who is a withholding agent?

Any person, corporation, association or partnership, in whatever capacity acting, who has the control, receipt, custody, disposal or payment of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under the law, is a withholding agent. (Section 350, subdivision 10)

62. Is a lessee or mortgagor of property, a fiduciary, an employer, or a state or a municipal officer or employe, a withholding agent?

Yes, if he has the control, receipt, custody, disposal or payment of items of fixed or determinable "taxable income" described in answer 61, of any resident or nonresident. (Section 350, subdivision 10)

63. What must a withholding agent retain?

Although subdivision 1 of section 366 requires a withholding agent to deduct and withhold 2 per cent of personal service income if the amount thereof for any nonresident taxpayer in any taxable year equals or exceeds $1,000, it is obvious that that provision is in conflict with the general purpose and intent of the statute. It is not in harmony with section 351 which imposes the tax, nor with subdivision 3 of section 366, which indemnifies a withholding agent against the claims and demands of taxpayers on account of a tax deducted and withheld and requires the withholding agent to account for a "tax" deducted. The comptroller will promulgate a rule requiring a withholding agent to deduct and withhold 1 per cent of the first $10,000 of all fixed and determinable annual or periodical personal service income of which he has the control, receipt, custody, disposal or payment, if the amount thereof in any taxable year equals or exceeds $1,000, and 2 per cent of all such income in excess of $10,000 in any taxable year, unless the recipient of the income files with him (the withholding agent) a certificate in the form to be prescribed by the comptroller showing that he is a resident of the state.

64. What is meant by personal service income?

It means all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed and determinable annual or periodical compensation, of whatever kind and in whatever form, paid or received for personal service. (Section 366, subdivision 1)

65. Should deducting and withholding be on the basis of the calendar year or the basis of the taxpayer's fiscal year?

Deducting and withholding should be on the basis of the calendar year; otherwise great confusion will arise.

66. Should a withholding agent deduct and withhold from payments due after May 14, 1919, on account of payments made before that date but since January 1, 1919?

Yes. The attorney-general has held, in a letter opinion dated May 29, 1919, that the deducting and withholding provision is to be construed retroactively, and that if the withholding agent has the opportunity to deduct and withhold according to the plan stated in answer 63, he should do that.

67. What about payments made prior to May 14, 1919, if the employe has left the service of the employer, or if payments made or to be made since May 14, 1919, are insufficient to meet the withholding requirements

In such a case the liability of the withholding agent is limited to the amount, if any, which he has the opportunity to deduct and withhold. If the employee left his service and was fully paid prior to May 14, no liability exists. If amounts due and payable are insufficient to meet the withholding requirement after May 14, 1919, the withholding agent will be liable to the full extent thereof but no more. (Letter opinion of attorney-general, May 29, 1919)

68. Should a withholding agent calculate as a portion of the amount paid or to be paid during 1919, the aggregate of payments made before May 14, 1919?

Yes.

69. Is deducting and withholding required in cases where the personal services are rendered entirely without the state by a non-resident?

No. (Letter opinion of attorney-general, May 29, 1919)

70. Where the income of a non-resident is for personal service rendered partly within and partly without the state, is all of it taxable in New York?

No. That portion received for services without the state is not taxable against nonresidents, but payments for services performed within the state are taxable. (Letter opinion of attorney-general, May 29, 1919)

70a. Is withholding required in cases where the personal services are rendered partly within and partly without the state by a non-resident?

Yes. Rules and regulations to be established by the comptroller will provide for the abatement to the nonresident of such portion of the sum deducted and withheld as relates to the personal service compensation earned without the state, or that the withholding agent may deduct in respect of the income earned within the state only and support his return to the comptroller with an appropriate affidavit.

70b. What must a withholding agent do with the per cent of income withheld?

He must pay it to the comptroller on or before the 15th day of March next following the close of the calendar year during which the payments were made or credited. (Section 366, subdivision 3)

70c. Is there any exception to the foregoing rule?

Yes; if the taxpayer shall have paid the tax to the comptroller, it shall not be again collected from the withholding agent. (Section 366, subdivision 5)

70d. What must a withholding agent do in respect of income, whether withheld or not?.

He shall return to the comptroller complete information concerning the items of fixed and determinable annual or periodical income of any taxpayers, except interest represented by coupons payable to bearer, if the amount of such income in any taxable year, under the receipt, custody or control of the withholding agent, equals or exceeds $1,000, subject to the authority of the comptroller to limit and regulate these requirements as he may determine. (Section 366, subdivision 2)

71. Is a withholding agent personally liable for a tax required to be withheld?

Yes, to the extent that the 2 per cent required to be retained will pay the tax. (Section 366, subdivision 3)

72. Is a withholding agent relieved of liability to the recipient for the percentage of income withheld?

Yes. (Section 366, subdivision 3)

RETURNS

73. With whom is a return of income required to be filed?

Taxpayers must file returns of income with the state comptroller. (Section 371)

74. When must they be filed?

On March 15 or before, next following the close of a taxable year. (Section 371)

75. Can the time for filing a return be extended?

Yes; the comptroller may grant a reasonable extension if, in his judgment, good cause exists. The extension of time may not be for a longer period than six months, except in the case of a taxpayer abroad, and, in both cases, interest at 6 per cent per annum will be charged on the tax. Rules and regulations to be adopted will answer this question more fully. (Section 371)

76. Who must file returns?

In general, returns must be filed by (a) resident taxpayers (section 367, (b) nonresident taxpayers, (c) fiduciaries (section 369), (d) withholding agents (section 366, subdivisions 2 and 3) and (e) partnerships (section 368).

77. When must a resident taxpayer file a return and what must it show?

Every resident taxpayer having a " net income " for a taxable year of $1,000 or over, if single or if married and not living with husband or wife, or of $2,000 or over if married and living with husband or wife, is required to make a return of income.

It must show a taxpayer's " gross income " and the deductions and the credits allowed by law, and such other data as may be called for on the return form to be prescribed by the comptroller in order that the true tax liability may be determined. (Section 367)

78. If a husband and wife living together have an aggregate " net income " of $2,000 or more, must each file a return?

Each may file a return or they may join in rendering a single return. (Section 367)

79. In such a case, if they make separate returns, how may the personal exemption be claimed?

The personal exemption of $2,000 may be taken by either or pro rated between them. (Section 362, subdivision 1)

80. If a taxpayer is unable to make a return, by whom shall it be rendered?

In such a case it may be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of the disabled taxpayer. (Section 367)

81. What should the return of a non-resident taxpayer show?

It must show " gross income " from all sources within the state, and if the deductions authorized by section 360 are claimed, it must show " gross income " from sources both within and without the state. (Section 367)

82. Are partnerships required to file returns?

Yes; every partnership must make a return for each taxable year. (Section 368)

83. What must the return of a partnership disclose?

It must show (a) " gross income ", (b) the deductions allowed by law, (c) the names and addresses of individual members entitled to distributive shares of " net income ", and (d) the distributive share of each. (Section 368)

84. May individuals who are members of partnerships be required to make a return in relation to the business of the partnership?

Yes; the comptroller may require any such taxpayer to make a return stating the gross receipts and net gains or profits of the partnership for any taxable year. (Section 364)

85. Are fiduciaries required to file returns?

Yes. Every fiduciary, except receivers appointed by authority of law in possession of part only of the property of a taxpayer, must make a return for the estate or trust or for the taxpayer for whom he acts (a) in case the taxpayer is a resident single person or if married and not living with husband or wife, if the " net income " is $1,000 or more, or in case the taxpayer is married and lives with husband or wife, if the " net income " is $2,000 or more in a taxable year; (b) in case the " net income " of the taxpayer, if an estate or trust, is $1,000 or over, or, (c) in case any beneficiary is a taxpayer other than a resident of the state. (Section 365, subdivision 2, and section 369)

86. What must the return of a fiduciary show?

It shall disclose the items of (a) " gross income ", (b) deductions, (c) exemptions, (d) credits and (e) a statement of each beneficiary's distributive share whether distributed or not, and such other data as may be called for on the form to be prescribed by the comptroller, in order that the income tax liability of the estate or trust or the distributive interests of the beneficiaries may be disclosed.

87. Is a withholding agent required to make a return?

Yes; if required to deduct and withhold any tax, he shall make a return thereof and pay the tax to the comptroller. If not required to deduct and withhold any tax, he must, nevertheless, make a return of information to the comptroller of the taxable income paid by him to any taxpayer if the amount of such income in any taxable year equals or exceeds $1,000. Exception is made in the case of income represented by interest coupons payable to bearer. (Section 366, subdivisions 2 and 3)

88. Should a non-resident taxpayer make a return of income withheld by a withholding agent?

Yes; income upon which any tax is required to be withheld at the source should be included in the return of the recipient of the income, but the tax withheld shall be credited against the amount of tax computed on such return. (Section 366, subdivision 4)

89. If a taxpayer changes from fiscal to calendar year or vice versa, are separate returns required for the partial year?

Yes, as provided in section 370, but such a change in the basis of computing " net income " cannot after the first year be made without the consent of the comptroller.

90. Will blanks be furnished upon which to render returns?

Yes; but failure to receive a form does not relieve a taxpayer from the obligation of rendering a return. (Section 371)

91. Will they resemble in form those prescribed by the United States commissioner of internal revenue?

Yes, so far as may be practicable. (Section 371)

92. What may the comptroller do if he believes a return is incorrect?

He may revise it and audit and state an account upon the return as revised and proceed to collect from the taxpayer additional taxes, penalties and interest. (Section 373)

93. What may the comptroller do if no return is filed?

He may examine or cause to have examined the books and records of any taxpayer and take testimony and proof material for his information. In addition, he may make an estimate of "taxable income" of such a taxpayer from any information in his possession and audit and state an account for the tax, penalties and interest due from the taxpayer. (Section 373)

94. What relief has a taxpayer if he has erred against his own interests in making a return or if the comptroller has erred in auditing and stating his account?

He may, within one year, make application for revision. The comptroller must grant a hearing on such an application and inform the taxpayer of his decision. If the taxpayer is not content with the comptroller's decision, he may review it by certiorari, but before making the application for a writ the taxpayer must furnish an undertaking. (Sections 374 and 375)

95. Will the contents of reports and returns be kept secret?

Yes. A severe penalty is prescribed if the comptroller or any officer, agent, clerk or employe divulges or makes known in any manner the amount of taxpayer's income or any of the particulars set forth in any report or return made, unless directed by a proper judicial order or in such other manner as may be provided by law. (Section 384)

96. Has the comptroller power to determine what facts shall be reported?

Yes; in addition to those named in the law, he may require such facts to be reported as may be necessary for the proper enforcement of the statute. (Section 371)

97. Must returns be verified by affidavits or affirmations of the persons rendering them?

Yes; to the effect that the statements contained therein are true. In the case of a fiduciary, the affidavit or affirmation shall be made to the effect that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that to the best of his knowledge and belief it is true and correct. (Sections 369 and 371)

PENALTIES

98. What penalty is provided for the failure to file the required return within the time provided?

(a) For such an omission one is guilty of a misdemeanor and may upon conviction be fined not to exceed $1,000 or imprisoned for no longer than a year, or both, at the discretion of the court.

(b) Furthermore, a taxpayer becomes subject to twice the ordinary rate of tax. (Section 376, subdivision 1)

99. What penalty is provided for making a false or fraudulent return with intent to evade the tax?

The same penalty is imposed as that stated in the last preceding answer.

100. What penalty attaches if one fails to pay the tax at the required time?

If one fails to pay his tax at the time required by or pursuant to law, he must pay in addition to the amount of such tax or part thereof, if it be an additional tax, 5 per cent of said amount plus 1 per cent for each month or fraction thereof that the tax or part thereof remains unpaid. (Section 379, subdivision 2)

101. May a taxpayer voluntarily make a return after having neglected or refused to do so within the required time?

Yes; he may make a correct return within sixty days, and in such a case there shall be added to the tax 5 per cent of the amount otherwise due, but such additional amount shall in no case be less than $2.00. (Section 376, subdivision 2)

POWERS OF COMPTROLLER

The duty of administering the income tax law is imposed upon the state comptroller. He is granted very broad powers. Put simply, he may do that which is necessary to be done to administer the law according to its purpose and intent, in respect of matters not specifically covered by the statute.

He is expressly enjoined (sections 356; 360, subdivisions 9, 10 and 11; 366, subdivisions 1 and 2; 369 and 371) to formulate rules and regulations covering features specifically enumerated, and authorized to make such others as he may deem necessary to enforce the act. (Section 383)

If a taxpayer neglects or refuses to pay a tax charged against him or his income, the comptroller may resort to any of the several means or methods of compelling payment stated in sections 380 and 381, or all of them in natural order.

CHAPTER 627

AN ACT to amend the tax law, in relation to imposing taxes upon and with respect to incomes.

Became a law May 14, 1919, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," is hereby amended by adding a new article to be article sixteen, to read as follows:

ARTICLE 16.

TAXES UPON AND WITH RESPECT TO PERSONAL INCOMES.

Section 350. Definitions.
351. Imposition of income tax.
352. Exemption of certain personal property.
353. Ascertainment of gain and loss.
354. Exchange of property.
355. Gain through exchange.
356. Inventory.
357. Net income defined.
358. Computation of net income.
359. Gross income defined.
360. Deductions.
361. Items not deductible.
362. Exemptions.
363. Credit for taxes in case of taxpayers other than residents of the state.
364. Partnerships.
365. Estates and trusts.
366. Information and payment at source.
367. Taxpayers' returns.
368. Partnership returns.
369. Fiduciary returns.
370. Returns when accounting period changed.
371. Time and place of filing returns.
372. Administration of income tax law.
373. Powers of comptroller.
374. Revision and readjustment of accounts by comptroller.
375. Review of determination of comptroller by certiorari and regulations as to writ.
376. Penalties.
377. When payable.
378. Notice of assessment.

Section 350. **Definitions.** For the purpose of this article and unless otherwise required by the context:

1. The word " comptroller " means the state comptroller.

2. The word " taxpayer " includes any person, trust or estate subject to a tax imposed by this article or whose income is in whole or in part subject to a tax imposed by this article, and does not include corporations.

3. The words " military or naval forces of the United States " include the marine corps, the coast guard, the army nurse corps, female, and the navy nurse corps, female, but this shall not be deemed to exclude other units otherwise included within such words.

4. The words " taxable year " mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this article. The words " fiscal year " mean an accounting period of twelve months, ending on the last day of any month other than December.

5. The word " fiduciary " means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, acting in any fiduciary capacity for any person, trust or estate.

6. The word " paid " for the purposes of the deductions and credits under this article, means " paid or accrued " or " paid or incurred," and the terms " paid or incurred " and " paid or accrued " shall be construed according to the method of accounting upon the basis of which the net income is computed, under this article. The term " received " for the purpose of the computation of net income under this article, means " received or accrued " and the term " received or accrued " shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

7. The word " resident " applies only to natural persons and includes for the purpose of determining liability to the tax imposed by this article upon or with reference to the income of any taxable year, commencing with the year nineteen hundred and nineteen, any person who shall, at any time on or after January first and not later than March fifteenth of the next succeeding calendar year, be or become a resident of the state.

8. The word " dividend " means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation.

9. The words " foreign country " or " foreign government " mean any jurisdiction other than one embraced within the United States. The words " United States " include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words " withholding agent " include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

§ 351. **Imposition of income tax.** A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen.

§ 352. **Exemption of certain personal property from taxation.** The taxes imposed by this article are in addition to all other taxes imposed by law, except that money on hand, on deposit or at interest, bonds, notes and choses in action and shares of stock in corporations other than banks and banking associations, owned by any individual or constituting a part of a trust or estate subject to the income tax imposed by this article, and from which any income is derived, shall not after July thirty-first, nineteen hundred and nineteen, be included in the valuation of the personal property included in the assessment-rolls of the several tax districts, villages, school districts and special tax districts of the state.

§ 353. **Ascertainment of gain and loss.** For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis

shall be first, in case of property acquired before January first, nineteen hundred and nineteen, the fair market price or value of such property as of January first, nineteen hundred and nineteen, and, second, in case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with this article.

§ 354. **Exchange of property.** When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger or consolidation of a corporation a taxpayer receives, in place of stock or securities owned by him, new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities or property exchanged.

§ 355. **Gain through exchange.** When in the case of any such reorganization, merger or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost of the stock or securities exchanged, if acquired on or after January first, nineteen hundred and nineteen, and its fair market price or value as of January first, nineteen hundred and nineteen, if acquired before that date.

§ 356. **Inventory.** Whenever in the opinion of the comptroller the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the comptroller may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income, and conforming so far as may be to the forms and methods prescribed by the United States commissioner of internal revenue under the act of congress known as the revenue act of nineteen hundred and eighteen.

§ 357. **Net income defined.** The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

§ 358. **Computation of net income.** 1. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year as the case may be) in accordance with method of accounting regularly employed in keep-

ing the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the comptroller does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in this article, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

2. If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the comptroller, be computed on the basis of such new accounting period, subject to the provisions of section three hundred and seventy.

§ 359. **Gross income defined.** The term " gross income ":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

2. Does not include the following items which shall be exempt from taxation under this article:

a. The proceeds of life insurance policies and contracts paid upon the death of the insured to individual beneficiaries or to the estate of the insured.

b. The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract.

c. The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

d. Interest upon the obligations of the United States or its possessions; or securities issued under the provisions of the federal farm loan act of July seventeen, nineteen hundred and sixteen; or bonds issued by the war finance corporation; or the obligations of the state of New York or of any municipal corporation or political subdivision thereof; or investments upon which the tax provided for in section three hundred and thirty one of this

chapter has heretofore been paid since June first, nineteen hundred and seventeen, during the period of years for which such tax shall have been paid.

e. Any amount received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

f. Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States.

g. Income received by any officer of a religious denomination or by any institution, or trust, for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, if such income be used exclusively for carrying out one or more of such purposes; but nothing herein shall be construed to exempt the fees, stipends, personal earnings or other private income of such officer or trustee.

3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article.

§ 360. **Deductions.** In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. In the case of a resident of the state such a proportion of the total interest paid or accrued during the taxable year on indebtedness, as the net income of the taxpayer taxable under this article bears to his total income from all sources; or in case of an individual not a resident of the state, the same proportion of interest paid or accrued within the taxable year on indebtedness which the amount of such gross income, as herein defined, bears to the gross amount of his income from all sources within and without the state.

3. Taxes other than income taxes paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, or, third, by the authority of any foreign government.

4. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

5. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions within the state.

6. Losses sustained during the taxable year of property not connected with the trade or business (but, in the case of a taxpayer other than a resident, only of property within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

7. Debts ascertained to be worthless and charged off within the taxable year.

8. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

9. In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted; provided, that in the case of such properties acquired prior to January first, nineteen hundred and nineteen, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date; provided, further, that in the case of mines, oil and gas wells, discovered by the taxpayer on or after January first, nineteen hundred and nineteen, and not acquired as the result of a purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery or within thirty days thereafter: such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the comptroller. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

10. Contributions or gifts made within the taxable year to corporations incorporated by, or associations organized under, the laws of this state and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures

to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by section seven of the act of congress known as the vocational rehabilitation act, to an amount not in excess of fifteen per centum of the taxpayer's net income as computed without the benefit of this subdivision. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the comptroller. In the case of a taxpayer other than a resident of the state this deduction shall be allowed only as to contributions or gifts made to corporations or associations incorporated by or organized under the laws of this state or to the vocational rehabilitation fund above mentioned.

11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the comptroller.

§ 361. **Items not deductible.** In computing net income no deduction shall in any case be allowed in respect of:

1. Personal, living, or family expenses;
2. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;
3. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or
4. Premiums paid on any life insurance policy, covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

§ 362. **Exemptions.** The following exemptions shall be allowed to any resident taxpayer:

1. In the case of a single person, a personal exemption of one thousand dollars, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of two thousand dollars. A husband and wife living together shall receive but one personal exemption of two thousand dollars against their aggregate net income; and in case they make separate returns the personal exemption of two thousand dollars may be taken by either or divided between them.
2. Two hundred dollars for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

3. A taxpayer receiving salary, wages, or other compensation from the United States as an official thereof, exempt from taxation under this article, shall be entitled to only so much of the personal exemption provided for in this section as is in excess of the aggregate amount of such salaries, wages, or other compensation.

§ 363. **Credit for taxes in case of taxpayers other than residents of the state.** Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws.

§ 364. **Partnerships.** Individuals carrying on business in partnerships shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed. Taxpayers who are members of partnerships may be required by the comptroller to make a return stating the gross receipts and net gains or profits of the partnership for any taxable year. The net income of the partnership shall be computed in the same manner and on the same basis as provided in computing the net income of individuals except that the deduction provided in subdivision ten of section three hundred and sixty shall not be allowed and the personal exemptions provided for in section three hundred and sixty-two shall be allowed only to the individual partners.

§ 365. **Estates and trusts.** 1. The tax imposed by this article shall apply to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust; and

d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual taxpayers, except that there shall also be allowed as a deduction any part of the gross income which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph d of subdivision one of this section, the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under section three hundred and fifty-nine, subdivision three.

4. In cases under paragraph d of sudbivision one of this section and in the case of any income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such

estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary of such estate or trust not a resident shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents.

§ 366. **Information and payment at source.** 1. Every withholding agent shall deduct and withhold two per centum from all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed and determinable annual or periodical compensation of whatever kind and in whatever form paid or received, earned for personal services and taxable under this article, of which he shall have control, receipt, custody, disposal or payment, if the amount paid or received or to be paid or received in any taxable year on account of any individual equals or exceeds one thousand dollars, unless there shall be filed with the withholding agent, before the time when he is required to make return and payment thereof, a certificate in such form as shall be prescribed by the comptroller to the effect that the person entitled to such salary, wage, commission, gratuity, emolument, perquisite or other compensation is a resident and setting forth his residence address within the state.

2. Every withholding agent shall make return to the comptroller of complete information concerning the amount of all interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits and income, except interest coupons payable to bearer, of any taxpayer taxable under this article of one thousand dollars or more in any taxable year under such regulations and in such form and manner and to such extent as may be prescribed by the comptroller.

3. Every withholding agent required to deduct and withhold any tax under subdivision one of this section shall make return thereof on or before the fifteenth day of March in each year and shall at the same time pay the tax to the comptroller. Every such individual, corporation or partnership is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this section.

4. Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

5. If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

§ 367. **Taxpayers' returns.** Every taxpayer having a net income for the taxable year of one thousand dollars or over if single or if married and not living with husband or wife, or of two thousand dollars or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this article. If a husband and wife living together have an aggregate net income of two thousand dollars or over, each shall make such a return unless the income of each is included in a single joint return. If the taxpayer is unable to make his own return the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. A taxpayer other than a resident shall not be entitled to the deductions authorized by section three hundred and sixty unless he shall make under oath a complete return of his gross income both within and without the state.

§ 368. **Partnership returns.** Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

§ 369. **Fiduciary returns.** Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the taxpayer for whom he acts, first, if the net income of such taxpayer is one thousand dollars or over if single, or if married and not living with husband or wife, or two thousand dollars or over if married and living with husband or wife, or second, if the net income of such taxpayer, if an estate or trust, is one thousand dollars or over or if any beneficiary is a taxpayer other than a resident of the state, which return shall state specifically the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the comptroller may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the comptroller or collector in the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

§ 370. **Returns when accounting period changed.** If a taxpayer, with the approval of the comptroller, changes the basis

of computing net income from fiscal year to calendar year, a separate return shall be made for the period between the close of the last fiscal year for which return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is made from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the last fiscal year. If the change is from one fiscal year to another fiscal year, a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year, he shall make a separate return for the period between the beginning of a calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the exemptions allowed in this article shall be reduced respectively to amounts which bear the same ratio to the full exemptions provided for as the number of months in such period bears to twelve months.

§ 371. **Time and place of filing returns.** Returns shall be made to the comptroller on or before the fifteenth day of March in each year of the taxpayer's net income for his last preceding taxable year. The comptroller may grant a reasonable extension of time for filing returns whenever in its judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad no such extension shall be granted for more than six months. Such returns shall, so far as may be, set forth the same or similar items called for in the blank forms of return prescribed by the United States commissioner of internal revenue for the enforcement of the act of congress known as the revenue act of nineteen hundred and eighteen, together with such other facts as the comptroller may deem necessary for the proper enforcement of this article. There shall be annexed to such return the affidavit or affirmation of the person making the return, to the effect that the statements contained therein are true. Blank forms of return shall be furnished by the comptroller upon application, but failure to secure the form shall not relieve any taxpayer from the obligation of making any return herein required.

§ 372. **Administration of income tax law.** The comptroller shall administer and enforce the tax herein imposed for which purpose he may divide the state into districts in each of which a branch office of the comptroller may be maintained; provided that in no cases shall a county be divided in forming district.

§ 373. **Powers of comptroller.** If in the opinion of the comptroller any return of a taxpayer is in any essential respect incorrect he shall have power to revise such return, or if any taxpayer fails to make return as herein required, the comptroller is authorized to make an estimate of the taxable income of such taxpayer from any information in his possession, and to audit and state an account according to such revised return or the estimate so made by him for the taxes, penalties and interest due the state from such taxpayer. The comptroller shall also have power to examine or cause to have examined, in case of failure to report the books and records of any such taxpayer, and may take testimony and require proof material for his information.

§ 374. **Revision and readjustment of accounts by comptroller.** If an application for revision be filed with the comptroller by a taxpayer within one year from the time of the filing of the return, or if the tax of such taxpayer shall have been recomputed, then from the time of such recomputation, the comptroller shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to him or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the comptroller shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of his determination thereon to the taxpayer.

§ 375. **Review of determination of comptroller by certiorari and regulations as to writ.** The determination of the comptroller upon any application made to him by any taxpayer for revision and resettlement of any computation of tax, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any statement of a computation or any determination by the comptroller under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the comptroller of the application for such writ. Before making the application an undertaking must be filed with him, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the comptroller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including costs of all appeals.

§ 376. **Penalties.** 1. Any person required by this article to make, render, sign or verify any return, who fails to make, render, sign or verify such return within the time required by or under a provision of law, or who makes any false or fraudulent return or statement, with intent to evade any tax imposed

by this article, shall be guilty of a misdemeanor and shall, upon conviction, be fined not to exceed one thousand dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court.

2. If any such person shall fail or refuse to make a return of income at the time or times hereinbefore specified, but shall voluntarily make a correct return of income within sixty days thereafter, there shall be added to his tax five per centum of the amount otherwise due, but such additional amount shall in no case be less than two dollars.

3. If any person liable to taxation under this article fails to make a return as herein required, the amount of income of such person discovered to be taxable shall be subject to twice the ordinary rate of taxation. If any person liable to taxation under this article makes any false or frauduent return or statement, with intent to evade any tax imposed by this article, and an additional amount is discovered to be taxable, such additional amount shall be subject to twice the ordinary rate of taxation. Such tax shall be collected at such time and in such manner as may be designated by the comptroller. This penalty shall be additional to all other penalties in this or any other section provided.

§ 377. **When payable.** 1. Each taxpayer shall, at the time of filing his return, pay to the comptroller the amount of tax payable hereunder as the same shall appear from the face of the return. If the time for filing the return shall be extended, he shall pay in addition interest thereon at the rate of six per centum per annum from the time when the return was originally required to be filed to the time of payment.

2. As soon as practicable after the return is filed, the comptroller shall examine it and compute the tax.

3. If the amount of tax as computed shall be greater than the amount theretofore paid, the excess shall be paid by the taxpayer to the comptroller within thirty days after the amount of the tax as computed shall be mailed by the comptroller.

4. If the amount of tax as computed shall be less than the amount theretofore paid, the excess shall be refunded by the comptroller out of the proceeds of the tax retained by him as provided in this article.

§ 378. **Notice of assessment.** Notice of tax assessment shall be sent by mail to the post office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be preserved by the comptroller.

§ 379. **Collection of taxes; penalties and interest.** 1. The comptroller is authorized at his discretion to designate agents for the purpose of collecting income taxes and shall require from them reasonable bond.

2. If the tax imposed by this article or any part of such tax be not paid at the time when required to be paid under the provisions of this article or in the case of additional taxes, at the time designated by the comptroller, the taxpayer liable to pay such tax shall pay to the comptroller, in addition to the amount of such tax, or part thereof, five percentum of said amount, plus one per centum for each month, or fraction of a month, the tax, or part thereof, remains unpaid.

§ 380. **Warrant for the collection of taxes.** If any tax imposed by this article or any portion of such tax be not paid within sixty days after the same becomes due, the comptroller shall issue a warrant under his hand and official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is filed and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property or chattels real of the person against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect income taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the comptroller shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax.

§ 381. **Action for recovery of taxes.** Action may be brought at any time by the attorney-general of the state at the instance

of the comptroller, in the name of the state to recover the amount of any taxes, penalties and interest due under this article.

§ 382. **Distribution of the income tax.** Of the revenue collected under this article the comptroller shall retain in his hands sufficient to provide at all times a fund in his hands in the sum of two hundred and fifty thousand dollars out of which he shall pay any refunds to which taxpayers shall be entitled under the provisions of this article. Of the remainder, fifty per centum shall be paid into the state treasury to the credit of the general fund. The remaining fifty per centum thereof shall, not later than the first day of July, and in case of moneys subsequently collected at least quarterly thereafter, be distributed and paid to the treasurers of the several counties of the state, in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. As to any county included in the city of New York such payment shall be made to the receiver of taxes in such city and be paid into the general fund for the reduction of taxation of the city of New York. The county treasurer shall apportion the amount so received among the several towns and cities within the county in proportion that the assessed valuation of the real property of each town or city bears to the aggregate assessed valuation of the real property of the county, and shall credit the amount apportioned to each town against the county tax payable by it, and shall pay the amount apportioned to each city to the chief fiscal officer of the city to be paid into the general fund for city purposes. If the amount of the credit to a town exceeds the county tax from such town, the excess shall be paid to the supervisor of the town and be by him credited to general town purposes.

§ 383. **Comptroller to make regulations and to collect facts.** The comptroller is hereby authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article.

§ 384. **Secrecy required of official; penalty for violation.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller, any agent, clerk, or other officer or employee to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney-general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the

provisions of sections three hundred and eighty and three hundred and eighty-one of this chapter. Reports and returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the state he shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

§ 385. **Contract to assume income tax illegal.** It shall be unlawful for any person to agree or contract directly or indirectly to pay or assume or bear the burden of any tax payable by any taxpayer under the provisions of this article. Any such contract or agreement shall be null and void and shall not be enforced or given effect by any court.

§ 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 3. An assessment on account of personal property made prior to August first, nineteen hundred and nineteen, shall be as valid and effectual as if this act had not been passed, and nothing in this act shall be construed to impair the obligation to pay taxes assessed on account of personal property in the year nineteen hundred and eighteen or the year nineteen hundred and nineteen prior to August first whether payable in that year or not.

§ 4. If in any city entitled to receive a portion of the taxes collected under article sixteen of the tax law as added by this act the budget for the fiscal year current on July first, nineteen hundred and twenty, shall be completed prior to that date, the board of estimate and apportionment or other board or body having the duty of preparing the budget in such city shall have the power subsequent to such date and before the levy of the taxes on account of the appropriations made by such budget to revise the estimates of city revenue so as to include in such calculation the income to the city from taxes collected under article sixteen of the tax law as added by this act.

§ 5. The sum of three hundred thousand dollars ($300,000), or so much thereof as may be needed, is hereby appropriated out of any money in the treasury, not otherwise appropriated, for the administration of article sixteen of the tax law as added by this act, but any position established or salary fixed for such purpose shall be deemed temporary only and subject to the future action of

the legislature but no new position shall be created nor salary fixed except on the unanimous approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

§ 6. Except as otherwise provided herein this act shall take effect immediately.

INDEX

STATE OF NEW YORK
OFFICE OF STATE COMPTROLLER
ALBANY, N. Y.

DEDUCTING AND WITHHOLDING AT SOURCE

Rules and Regulations of the State Comptroller, in Relation to Taxes Imposed Upon and With Respect to Incomes by Chapter 627 of the Laws of 1919

FOREWORD

The following regulations, articles 261 to 269, relative to deducting and withholding at source, are promulgated in advance of the formulation of a complete set of rules and regulations because of the immediate importance of the subject.

Eugene M. Travis

Comptroller.

June 11, 1919.

DEDUCTING AND WITHHOLDING AT SOURCE

Art. 261. **Deducting and withholding tax at source.** Under the opinion of the Attorney-General (Income Tax Letter No. 1, May 29, 1919), deducting and withholding is required of one per cent. (1%) on the first $10,000 and of two per cent. (2%) on all sums in excess of $10,000 from all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed and determinable annual or periodical compensation earned for personal services in a business, trade, profession or occupation carried on within the State, if the aggregate amount thereof in any calendar year on account of any individual equals or exceeds $1,000, unless there shall be filed with the withholding agent a certificate of residence, on Form 101, to the effect that the recipient is a resident of the State and setting forth his residence address within the State.

Art. 262. **Deducting and withholding in 1919.** Withholding agents shall deduct and withhold, as set forth in Article 261, in respect of personal service compensation paid or credited to the payee at any time on or after January 1, 1919, except that if the employee left the service of the withholding agent prior to May 14, 1919 (the date of the enactment of chapter 627 of the Laws of 1919), *and was fully paid prior to that date,* no duty or obligation in respect to such payments rests on the withholding agent, unless the status of employer and employee is again created during 1919 and further payments of compensation for personal services are made or credited in 1919. In other words, the provisions for deducting and withholding are effective from January 1, 1919, except as stated in this article.

Art. 263. **Fixed or determinable annual or periodical income.** Only income earned for personal services is subject to deducting and withholding. The statute specifies that every withholding agent shall deduct from all salaries, wages, commissions, gratuities, emoluments and perquisites. But other kinds of personal service income may be included if fixed or determinable, annual or periodical. Income is fixed when it is to be paid in amounts definitely predetermined. It is determinable whenever there is a basis of calculation by which the amount to be paid may be

ascertained. The income need not be paid annually or at an annual rate. It may be paid periodically. The word "periodical" is used in opposition to "annual" and means from time to time, whether or not at regluar intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event, does not make the payments any the less determinable or periodical.

The following shall be deemed to be fixed and determinable annual or periodical compensation within the meaning of section 360 of the Tax Law:

Any payment made by way of salary, wage, commission, gratuity, emolument, perquisite or otherwise for personal services rendered, if the amount thereof shall be

(a) determined prior to, concurrent with or subsequent to the rendering of the service, and is

(b) based on personal services rendered by the hour, week, month, year or other period of time,

whether such personal service consists of

(c) the performance of specified or unspecified duties, or of

(d) work done on or in connection with one or more of certain articles or parts thereof:

irrespective of whether payment be made

(e) in cash,

(f) in board or lodging, or both,

(g) in the stock of a corporation,

(h) by promissory note or other obligation, or

(i) in property, service or otherwise.

If payment shall be made otherwise than in cash, it shall be considered and treated as payment in cash to the fair market value (determinable usually by understanding or agreement existing between the payor and the payee) of such medium, other than cash, as may be employed.

Fees for professional services are not subject to withholding unless contracted for or paid on an annual or periodical basis.

Art. 264. **Year, for purposes of deducting and withholding.** Deducting and withholding of personal service compensation by withholding agents shall be on the basis of a calendar year, irre-

spective of the basis of reporting adopted by the payee-taxpayer. Personal service compensation shall be deemed to have been paid by the withholding agent and received by the payee-taxpayer only if and to the extent actually paid or credited to the payee and thus made reducible to possession by him. Commissions and all other forms of personal service compensation determined and paid or credited to a payee-taxpayer after the close of a calendar year, shall, for the purpose of deducting and withholding the tax and of returning information with respect thereto, be treated as payments made in the calendar year when paid or credited, but for such purposes only. The approved method of accounting employed by the payee-taxpayer shall govern in so far as he may be called upon to account for such payments for income tax purposes.

Art. 265. **Income not subject to deducting and withholding.** Deducting and withholding from income is not required in the following cases:

(a) In respect of personal service compensation income when there shall have been filed with the withholding agent a resident's certificate on Form 101, to the effect that the person receiving the compensation is a resident of this State and setting forth his residence address within the State.

(b) If of a character other than compensation for personal services.

(c) Where the personal services are rendered entirely without the State, by a nonresident, whether payment be made from within or without the State, irrespective of the status of the withholding agent. The occasional entry into the State of a nonresident employee who performs the duties for which he is employed entirely without the State, but enters the State for the purpose of reporting, receiving instructions, accounting, etc., incidental to his duties without the State, shall not be deemed to take such employee out of the class of those rendering their services entirely without the State.

(d) Where the personal services are rendered within the State, if rendered for, and delivery of payment is made

without the State by, a nonresident individual or partnership having no office or place of business or paying agent within the State, or a foreign corporation that (1) is not registered in New York and (2) has no office or place of business or paying agent within the State. (Nothing in sub-paragraph "d" shall be construed to relieve the *recipient* from liability to make return and pay the tax on such income.)

Art. 266. **Income of a nonresident for services performed partly within and partly without the State.** In case a nonresident receives compensation for personal services rendered or performed partly within and partly without the State, the withholding agent shall deduct and withhold on the entire amount of compensation, as set forth in Article 261, unless the withholding agent files with the Comptroller, with his return (Form 103) of sums deducted and withheld. a certificate on Form 102, setting forth

(1) that the employee is a nonresident (stating his address);
(If the withholding agent has not personal knowledge of the place of residence of the employee, he may state it upon information and belief, provided he submits with his certificate the affidavit of the employee stating such residence.)

(2) that part only of the payments made were for services performed within the State, and

(3) the amount in dollars and cents of such part. If brought into question, the burden of proof will be on the withholding agent to show that no greater portion than that set forth in his affidavit of the payments made was for services performed in this State.

In apportioning such income of a nonresident, the following rules shall be observed by the withholding agent:

(a) If the nonresident is a salesman, drummer, agent or other employee through whose services receipts or remuneration inure directly to the employer, the deducting and withholding shall attach to the portion of the entire salary which the volume of business transacted by the employee within the State of New York bears to the total volume of business transacted within and without the State by such employee.

(b) If the nature of the employment of the nonresident is such that receipts or remuneration for services rendered do not inure directly to the employer, as in the case of clerks, bookkeepers, laborers or other like classes of employees, the deducting and withholding shall attach to the portion of the personal service compensation income of such employee which the time employed within the State bears to the time employed both within and without the State.

(c) If it is not possible to apportion the income as above provided, because of the peculiarities of the service of the employee, the apportionment shall be made in accordance with the facts and the tax deducted and withheld accordingly. In such a case a full statement of the facts shall be made to the Comptroller.

Art. 267. **Form of residence certificate.** Form 101 shall be used by residents of the State of New York for the purpose of claiming the benefit of such residence for income tax purposes. Withholding agents shall retain, preserve and keep available for examination and inspection by the Comptroller or his authorized representative all residence certificates for a period of one year next following the close of the calendar year for which such certificates shall have been given. Blanks (Form 101) will be furnished by the Comptroller on the application of withholding agents. Withholding agents may, if they choose to do so, use blanks acquired from other sources, provided, however, that the form and wording thereof shall comply exactly with Form 101.

Art. 268. **Revocation and renewal of residence certificates.** An employee who has filed a certificate of residence on Form 101, and who thereafter changes his residence, shall notify his employer of such change. Any employer who has reasonable ground for believing that an employee has changed his residence, after notice to the employee, may revoke the certificate of residence theretofore filed by such employee, and, in default of a new certificate of residence, shall deduct and withhold from the compensation of such employee for the entire calendar year, as provided in Article 261.

A certificate of residence shall be effective only for the calendar year in which it is filed.

Art. 269. **Deducting and withholding where residence is established.** When a withholding agent shall have deducted and withheld from the personal service compensation of an employee and such employee shall thereafter, before return of the amount so withheld is made by the withholding agent but not later than March 15 in the year following, file with the withholding agent a residence certificate on Form 101, the withholding agent shall thereupon pay over to the employee the entire amount of income so deducted and withheld for such calendar year.

Pursuant to the authority conferred by chapter 627 of the Laws of 1919, the foregoing regulations (Articles 261–269, inclusive) in relation to "Deducting and Withholding at Source", are hereby made and promulgated.

Eugene M. Travis

Comptroller.

Albany, N. Y., *June* 11, 1919.

Form 101

NEW YORK STATE INCOME TAX

EUGENE M. TRAVIS, State Comptroller

9-6-19-100,000

THIS CERTIFICATE HAS NO EFFECT ON CITIZENSHIP OR VOTING RESIDENCE

CERTIFICATE OF TAXPAYER CLAIMING RESIDENCE IN THE STATE OF NEW YORK

(To be filed with withholding agent by resident of New York State, pursuant to section 366 of the tax law, for the purpose of claiming the benefit of such residence for income tax purposes.)

To..
(Withholding agent)

....
(Address)

I hereby declare that I am a resident of the state of New York; that I reside at..............................
(Street and number)

....N. Y., that I have no definite intention as to when (if at all)
(City, town or village) (County)

I will establish my home without the state; and that if I decide to establish my home without the state, or at another place within the state, I will promptly give you notice of that fact and of my new residence address.

(Signed)..

57 [Endorsed:] E. 16-153. District Court of the U. S. Southern District of New York. The Yeale & Towne Manufacturing Company, Complainant, vs. Eugene M. Travis, Comptroller of the State of New York, Defendant. Bill of Complaint. Archibald Cox, Solicitor for Complainant, 233 Broadway, Borough of Manhattan, City of New York. Filed July 2, 1919.

58 District Court of the United States for the Southern District of New York.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,
against
EUGENE M. TRAVIS, as Comptroller of the State of New York, Defendant.

IRS:

Please take notice that the defendant herein moves to dismiss the ill of complaint in this suit verified July 1st, 1919, for the following eason:

That the complainant has not in and by said bill made or stated uch a cause as does or ought to entitle it to any such relief as is hereby sought and prayed for from or against this defendant.

Dated, Albany, N. Y., July 7, 1919.

Yours, &c.,

CHARLES D. NEWTON,
Attorney-General of the State of New York and Solicitor for Defendant; Office & Post Office Address, Capitol, Albany, N. Y.

To Archibald Cox, Esq., Solicitor for Complainant; Alex. Gilhrist, Jr., Esq., Clerk.

9 [Endorsed:] 15197. Eq. 16-153. District Court of U. S. Southern District of New York. The Yale & Towne Manuacturing Company, Complainant, against Eugene M. Travis, as omptroller, Etc., Defendant. Copy Notice of Motion to Dismiss Bill of Complaint.. Charles D. Newton, Attorney-General, Attorney or Def't, Office & P. O. Add., Capitol, Albany, N. Y. Personal ervice of a copy of within notice is admitted this 8th day of July, 919. Archibald Cox, Compl't's Sol'r. Filed July 9, 1919.

0 Filed Aug. 6, 1919.

istrict Court of the United States, Southern District of New York.

In Equity. E. 16-153.

HE YALE AND TOWNE MANUFACTURING COMPANY, Complainant,
vs.
EUGENE M. TRAVIS, Comptroller of the State of New York, Defendant.

Upon motion to dismiss the bill upon the ground that it does not ate a cause entitling the complainant to the relief sought.

Motion denied.

Louis H. Porter and Archibald Cox (F. Carroll Taylor with them on the brief), for Complainant.

James Y. Ivins, Deputy Attorney General of the State of New York, for Defendant. (No brief was submitted upon behalf of the defendant.)

The complainant, a Connecticut corporation, has its plant and principal business place at Stamford, Connecticut. It is authorized to do business in this State, where it maintains an office, owns property and employs numerous residents of other States, to wit, of New Jersey and Connecticut, who are occupied in whole or in part in the complainant's business within this State. A number of complainant's employees, who are non-residents of New York, perform substantially all of their services at the New York office, and their salaries are paid at stipulated times in the City of New York from
61 funds of the complainant within the State. Still other employees similarly situated have their salaries paid to them by checks sent by mail from the home office to such employees in New York. Still other non-resident employees are occupied in services which are rendered partly in Connecticut and partly in New York, some spending relatively little time in Connecticut and vice-versa, the amount of time spent in each place depending upon circumstances. The complainant also employs certain non-residents as traveling salesmen, who spend their time in New York and in traveling through other states.

The number of employees occupied as above set forth, whose salaries are in excess of $1,000 per annum, exceed fifty in number and their total salaries are in excess of $200,000.

Upon May 14, 1919, what is known as "Chapter 627 of the Laws of 1919" and entitled "An Act to amend the tax law, in relation to imposing taxes upon and with respect to incomes" became a law of this State.

Section 351 of the Act provides:—

"A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows": 1% on amounts not exceeding $10,000, 2% upon amounts in excess of $10,000 and not in excess of $50,000, and 3% on amounts in excess of $50,000.

The section continues, "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state." The tax shall first be levied and paid with respect to the calendar year 1919.

62 From here on the Act proceeds to specify its provisions in much detail. "In general," says Mr. Powell in his very recent work, Taxation of Corporations and Personal Income, "it may be said that the New York law has copied the Federal Income Tax Act, substituting 'taxpayer other than a resident' for 'non-resident alien' and 'January 1, 1919' for 'March 1, 1913.' The remedial procedure and method of collection in the New York Corporation Tax Law, Arts. 9 and *9a,* are substituted for the Federal procedure." * * *

Non-residents are not entitled to the personal exemption provided for residents, to wit, $1,000 for unmarried persons, and $2,000 for married persons and $200 for each dependent.

Residents are likewise entitled to certain deductions in computing net income, but non-residents are allowed such proportion of deduction as the main income arising from sources within the state bears to the total income. The method of apportionment and allocation of claimed deductions is to be determined by the State Comptroller.

The Act creates "withholding agents," and the complainant would be one under the definition of the term, and such agents are required "to deduct and withhold 2% from all salaries, wages, commissions, annuities, emoluments, and other fixed and determinable annual or periodical gains, profits and incomes of which he shall have control, receipt, custody, disposal or payment, if the amount paid or received in any year equals or exceeds $1,000, unless there shall be
62½ filed with the withholding agent before the time to return any payment a certificate * * * to the effect that the person entitled to such salary," etc., is a resident, and setting forth his residence in the state.

The complainant alleges the existence between it and its employees of term contracts and is so positioned generally as to come within the terms of this Act, and would, it says, be put to considerable expense in withholding a percentage of the salaries of its employees. The defendant as Comptroller is alleged to threaten to enforce the penalties of the statute against the complainant unless it complies with the terms of the statute. The jurisdictional allegations of the bill being sufficient, the complainant asks for equitable relief against the threatened action of the Comptroller upon the grounds:

(1) That the statute is illegal and unconstitutional, in that it is contrary to and in violation of Article I, Section 8, of the Constitution by interfering with and directly hindering commerce;

(2) That it impairs the obligation of contracts between the complainant and its employees;

(3) That it is contrary to Section 2 of Article IV of the Constitution, in that it deprives the citizens of the State of Connecticut and of New Jersey of the privileges and immunities enjoyed by citizens of the State of New York.

(4) That it contravenes the Fourteenth Amendment of the Federal Constitution, in that it abridges the privileges

63 and immunities of citizens of the United States residing in, and citizens of, Connecticut and New Jersey and states other than New York, and that the complainant and its employees are deprived of their property without due process of law, and that they are denied the equal protection of the laws.

KNOX, *D. J.*

By reason of the decision which I have determined should be made in this case, it will be unnecessary to enter upon a discussion of the enactment in its entirety. That a state possesses practically unlimited powers of taxation within the realm of its jurisdiction save as circumscribed by constitutional limitations, is elementary, and income taxes are no exception.

The outstanding question, it seems to me, in this litigation is whether the Act as drawn transgresses upon the equal privilege and immunity provisions of the Federal Constitution. If it does, I need proceed no further.

So far as decided cases upon this precise question go, there appear to be none.

It is true the question was raised in the Income Tax Cases of Wisconsin, 148 Wisconsin, 456, wherein Chief Justice Winslow said:

"It is argued that the provisions which deny to non-residents the exceptions which are allowed to residents * * * violate Section 2 of Article IV of the Federal Constitution, which provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' * * * We regard it as a question involved in considerable doubt, and one not necessary to be passed upon now."

The case of Shaffer v. Howard, 250 Federal, 873, by reason
64 of its facts, is but of little help in this instance, and it is necessary to consider more or less original sources, and resort is had to the case of Corfield v. Coryell, 4 Washington Circuit Court Reports, 381.

The accuracy of the language, and the authority of this case, so far as I know, have not been questioned, and Justice Washington there said that he had no hesitation in confining the expression, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" to those privileges and immunities which were in their nature fundamental, which belong of right to citizens of all free governments and which have at all times been enjoyed by the citizens of the several states which compose the Union from the time of their becoming free, independent and sovereign. Among these fundamental rights, said Justice Washington, were "the right of a citizen to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to take, hold and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the state."

Thereafter, in Paul v. Virginia, 8 Wall., 168, at page 180, the Supreme Court said:—

"It was undoubtedly the object of the" (Constitutional) "clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminat-
65 ing legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

Again, in Ward v. Maryland, 12 Wall., 418, the Court, in specifying some of the rights included within the words "privileges and immunities," said one of them was that a citizen of one state should be "* * * exempt from any higher taxes or excises than are imposed by the state upon its own citizens." See also, Cooley, Const. Limitations, 16. Subsequently in the Slaughter House Cases, 16 Wall., 36, it was said that the purpose of the Fourteenth Amendment "* * * was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." Certainly the force of this pronouncement was not qualified by the vigor of the dissents in these cases; and also in Barbier v. Connolly, 113 U. S., 27, in a discussion of the Fourteenth Amendment somewhat similar language was used.

Then there may be found the cases of Blake v. McClung, 176 U. S., 59, followed by Sully v. American National Bank, 178 U. S., 289, wherein it was held that non-resident unsecured creditors stood upon the same footing with resident unsecured creditors, a statute of Tennessee to the contrary notwithstanding.

66 It need not be argued that the rights of a corporation created by one state within the borders of another state are not altogether similar to the rights of a natural person so circumstanced. Paul v. Virginia, supra; but even so, it was decided in Southern Railway v. Greene, 216 U. S., 400, that to tax a foreign corporation under the circumstances there present by a different and more onerous rule than was used in taxing domestic corporations for the same privilege, constituted a denial of the equal protection of the law.

In Wiley v. Parmer, 14 Ala., 627, it was held that the statute of that state, taxing the slaves of a non-resident at double the amount at which those of a resident were taxed, was unconstitutional.

In Bliss's petition, 63 N. H., 135, it was held that a state cannot refuse a pedler's license to a citizen of another state, asked for

upon the same terms that it grants licenses to its own citizens. Among other things the Court said:—

"The equality of privileges and immunities guaranteed by the federal constitution to the citizens of each state exempts them from any higher taxes than the state imposes upon her own citizens."

Other cases to the same general effect are, State v. Lancaster, 63 N. H., 267; McGuire v. Parker, 32 La. Ann., 832; Oliver v. Washington Mills, 11 Allen, 280; Town of Farmington v. Downing, 30 Atl. Rep., 345.

In Sprague v. Fletcher, 69 Vt., 69, it was declared that an act of Vermont which denied to non-residents of the state rights which are allowed to residents under the same circumstances, in re-
67 spect to deductions from taxable personal property by reason
of debts owed by the taxpayers, conflicts with Article IV, Section 2, of the Federal Constitution, which secures to citizens of each state "all the privileges and immunities in the several states."

Tested by the standard of the principles set forth in the foregoing cases, does the failure to accord to non-residents of the state the exemptions and immunities provided for to residents make this law, or part of it, invalid?

It becomes necessary to determine what persons are meant by the term "non-residents." The Comptroller of the State has used this language in referring to the term: "A person is a non-resident within the meaning of the act, if he receives taxable incomes from property owned or from a business, trade, profession or occupation carried on in the state, but is not a resident thereof." What I have to say will be confined to such non-residents who are citizens of states other than New York.

The question is of importance to the State of New York and is likewise of importance to the thousands of persons, residents and citizens of adjoining states, who daily come into this state and here contribute to its welfare and prosperity.

It may be well to inquire what is the nature of the discrimination which it is alleged non-residents will be subjected to under the operation of the law. The following illustration will serve to answer the inquiry:

Two persons are employed in this State by the plaintiff.
68 Their work is in all respects similar, and each receives a
salary of $2,000 per annum. Assume that each employee is married, one living with his wife in New York, the other living with his wife in Connecticut. Under the law as it is written the resident of New York would be exempt from taxation, but the resident of Connecticut would be subject to a tax of $20.

Section 366 provides that "exery withholding agent shall deduct and withhold two per centum from all salaries" etc., of non-residents. The tax imposed by Section 351 is at the rate of one per cent. on net incomes up to $10,000; this is obviously an error in the Act, and under the regulations withholding agents are required to withhold but one per cent. Without commenting upon the authority of the regulation so imposed, this discrepancy may be passed. The withholding of any sum from the salaries of non-residents is objected

to, inasmuch as there is no withholding from residents. Assuming the power to lay a tax upon non-residents based upon personal service, this feature of the Act I am inclined to think is not necessarily fatal to its validity. It is the law, I think, that not only must the final purpose of the law be considered, but the means of its administration—the ways it may be defeated. St. John v. New York, 201 U. S., 633. As to this feature of administration, I believe that some classification between residents and non-residents may with propriety be made. District of Columbia v. Brooke, 214 U. S., 138; Field v. Barber Asphalt Co., 194 U. S., 618. Reference may also be had to Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 232, wherein the Court held that the deduction of a tax by a withholding agent is merely a matter of convenience adopted as a secure
69 method of collecting the tax, and as such is not objectionable.

As to the inconvenience resulting to the non-resident by eason of the payment by the withholding agent of the gross amount so withheld, and the trouble and expense of the taxpayer in recovering any excess over the tax finally determined upon, I need not now comment.

Paragraph 5 of Section 360 provides that a resident may deduct losses incurred in any transaction entered into for profit, though not connected with the trade or business, "but in the case of a taxpayer other than a resident of the state only as to such transaction within the state." The result of this is that two employees of complainant, each receiving a salary of $5,000 a year, may together enter into a business venture in another state; if the venture within a year results in a loss of say $5,000 to each, the resident of New York may deduct his loss and pay no tax, but the non-resident of New York is subject to the tax. Also under paragraph 6 a resident may deduct his losses from fires, but unless the property of a non-resident injured by fire is within this state he can make no deduction.

Theoretically, the first of the two last-mentioned discriminations may be justifiable upon the ground that as to a resident of New York the state is entitled to tax upon his gains and profits from sources without the state, whereas as to a non-resident the
70 tax may be recovered only as to net income from property, businesses and occupations within the State of New York. The fact, however, remains that it is the personal knowledge of us all that the only appreciable source of income of thousands of non-residents subject to this tax lies within the confines of this state, and that as a matter of practical operation of the statute the effect will be simply to deny to a non-resident, no matter what his misfortune, any exemptions. That there are in these provisions of the law a number of problems as to the character and place of income sought to be taxed well worthy of serious consideration, is undeniable; but in the aggregate, I am of opinion that as now framed the statute cannot operate without depriving citizens of other states of privileges and immunities which are open to citizens and residents of New York.

The difficulty here has arisen, it would appear, by the legislature having assumed that a citizen of the United States residing in a

state other than New York sustains to the taxing power of that state the same relationship that a non-resident alien sustains to the federal taxing power. There is, however, a distinction. Generally speaking, the United States Government, as suggested by Mr. Powell in his book "Taxation of Corporations and Personal Incomes," may prescribe terms under which aliens may do business here or prevent them from doing business here altogether. By the Fourteenth Amendment it is declared that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"
71 and "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is this provision of the Constitution along with the 2d Section of Article IV and the Interstate Commerce Section of our fundamental law that have been largely responsible for the community of interest, the unanimity of purpose, the united effort, and the magnificent accomplishments of our poeple. If now, under one pretence or another, the states are to erect economic and taxation barriers along their boundaries, it is but a question of time when the citizens of the various states will for all practical purposes be burdened with the disabilities of alienage, and this would be intolerable.

For these reasons, I am constrained to hold that the provisions of Chapter 627 of the Laws of the State of New York for the year 1919 are, in so far as they attempt to assess, lay and collect a tax upon citizens of the United States who are not residents of the State of New York, and who are citizens of other states, without according them the privileges and immunities afforded by said Act to citizens of the United States who are citizens of the State of New York and resident therein, are unconstitutional and void. Nothing herein, however, is meant to be decided as to the validity of the statute so far as it relates to residents of the State of New York.

Neither that question nor the question as to the power of the state to lay a tax upon non-resident citizens of another state based upon their earnings in this state for personal service rendered
72 need, in view of the basis of my decision, now be considered.

The motion will be denied.

August 6, 1919.

(Sgd.) JNO. C. KNOX
U. S. District Judge.

73 & 74 *Copy.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Court House and Post Office Building, in the Borough of Manhattan and City of New York, in said District, on the 13th Day of August, 1919.

Present: Hon. John C. Knox, District Judge.

In Equity. 16-153.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,

vs.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Defendant.

The motion of the defendant to dismiss the Bill of Complaint herein coming on to be heard, and after hearing Counsel for the respective parties hereto, it is

Ordered that said motion be and the same is hereby denied with leave to defendant to answer the Bill of Complaint herein within twenty days from the date hereof.

JNO. C. KNOX,
United States District Judge.

75 [Endorsed:] 15197. 53/191. In Equity 16-153. United States District Court, Southern District of New York. The Yale & Towne Manufacturing Company, Complainant, vs. Eugene M. Travis, as Comptroller of the State of New York, Defendant, Order denying motion to dismiss bill. Archibald Cox, Compl't's Solct., 233 Broadway, New York City. Entered in docket, Aug. 11, 1919. Filed Aug. 13, 1919.

76 District Court of the United States for the Southern District of New York.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,

vs.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Defendant.

The Answer of Eugene M. Travis, Comptroller of the State of New York, the Above-named Defendant, to the Bill of Complaint Herein.

1. Defendant denies each and every allegation of paragraph "10" of the bill of complaint and prays that the bill of complaint be dismissed with costs.

EUGENE M. TRAVIS,
Comptroller of the State of New York.

Charles D. Newton, Attorney General of the State of New York and Solicitor for Defendant, Capitol, Albany, N. Y.

STATE OF NEW YORK,
City and County of Albany, ss:

Eugene M. Travis, being duly sworn, says: I am the Comptroller of the State of New York and the defendant herein, and the foregoing answer is true to the best of my knowledge, information
77 and belief.

EUGENE M. TRAVIS.

Sworn to before me this 11th day of August, 1919.
[NOTARY'S SEAL.] J. S. Y. IVINS,
Notary Public, Albany County, N. Y.

78 [Endorsed:] District Court of the U. S. Supreme Court Southern District of New York. The Yale & Towne Manufacturing Company, Complainant, vs. Eugene M. Travis, Comptroller of the State of New York, Defendant. Copy. Answer. Charles D. Newton, Attorney-General, Attorney for Defendant Capitol, Albany, N. Y. Filed Aug. 13, 1919.

79 & 80 United States District Court, Southern District of New York.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,

against

EUGENE M. TRAVIS, as Comptroller of the State of New York, Defendant.

Memorandum.

This is the final hearing on bill and answer raising only issues of law and no issues of fact. The motion to dismiss the bill brought up the constitutionality of the enactment in the particulars attacked. In denying the motion to dismiss the bill, Judge Knox wrote a comprehensive opinion, the result of which was to find the statute unconstitutional in certain respects. The present hearing does not present any new matter and, in accordance with well settled practice, final decree will be in accord with the opinion and decision of Judge Knox.

The final decree is signed herewith.

JULIUS M. MAYER,
District Judge.

September 8, 1919.

81 At a Stated Term of the District Court of the United States for the Southern District of New York, held at Room 1, Woolworth Building, in the Borough of Manhattan in the City of New York, in said District, on the 8th day of September, 1919.

Present: Hon. Julius M. Mayer, Judge.

In Equity. 16-153.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,

vs.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Defendant.

This cause having come on to be heard at final hearing at this term, was argued by counsel; and thereupon upon consideration of, it is—

Ordered, adjudged and decreed that an injunction issue herein perpetually enjoining the defendant, Eugene M. Travis, as comptroller of the State of New York, his agents and all persons acting under his instructions from requiring the complainant, The Yale & Towne Manufacturing Company, to deduct or withhold from the salaries, wages or other fixed determinable annual or periodical compensation earned by its employees, residing in the State of Connecticut or any State other than the State of New York and engaged

81½ wholly or partly in the performance of service in the State of New York, any income tax claimed to be due from such employees to the State of New York on account of said services under the statute entitled "Chapter 627 of the laws of 1919" enacted by the Legislature of the State of New York and approved by the Governor of said State, May 14, 1919; and from requiring the complainant under said statute to make any return to the defendant of information concerning the amount of salaries, wages or other fixed or determinable gains or income paid by it to any of its said employees engaged wholly or in part in rendering service in the State of New York and residing outside of the State of New York, and from requiring the complainant to pay as a tax due from said non-residents or any of them under said statute, any sum whatsoever; and from instituting any proceedings against the complainant because of its failure to make, sign or verify a return of salaries, wages or other income paid by it to said non-residents or any of them, as required by the provisions of said statute; and from instituting any proceedings against the complainant for the recovery of penalties or otherwise for its failure to withhold from the wages, salaries or other income due to its said non-resident employees as required by said statute or for the failure of the complainant to make and file a return thereof to the defendant or to pay the amount thereof as by said statute required.

JULIUS M. MAYER,
United States District Judge.

[Endorsed:] In Equity, 16-153. United States District Court Southern District of New York. The Yale & Towne Manufacturing Company, Complainant, v. Eugene M. Travis, as comptroller of the State of New York, Defendant. Final Decree. Archibald Cox, Compl't's Solct. Filed Sept. 8, 1919.

82 District Court of the United States, Southern District of New York.

THE YALE & TOWNE MANUFACTURING COMPANY,
Complainant-Appellee,

against

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Defendant-Appellant.

And now comes Eugene M. Travis, defendant-appellant herein, and assigns the following error, namely: that the United States District Court for the Southern District of New York erred in granting the injunction contained in the decree dated September 8, 1919.

Wherefore, the defendant prays that the said decree be reversed and the District Court directed to dismiss the bill.

CHARLES D. NEWTON,
Attorney General of the State of New York, Solicitor for Defendant-Appellant, Capitol, Albany, N. Y.

83 [Endorsed:] District Court of the U. S. Supreme Court, Southern District of New York. The Yale & Towne Mfg. Co., complainant-appellee, vs. Eugene M. Travis, as Comptroller of the State of New York, defendant-appellant. Copy. Assignment of Error. Charles D. Newton, Attorney-General, attorney for defendant. Capitol, Albany, N. Y. Filed Sept. 8, 1919.

84 District Court of the United States, Southern District of New York.

THE YALE & TOWNE MANUFACTURING COMPANY,
Complainant-Appellee,

against

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Defendant-Appellant.

The above named defendant, Eugene M. Travis, conceiving himself aggrieved by the final decree made and entered in the above entitled cause and dated on the 8th day of September, 1919, does hereby appeal from said decree to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record of proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States. Albany, N. Y., September 8, 1919.

CHARLES D. NEWTON,
Attorney General of the State of New York and Solicitor for Defendant-Appellant, Capitol, Albany, N. Y.

The foregoing appeal is hereby allowed this 8th day of September, 1919.

JULIUS M. MAYER,
U. S. District Judge for the Southern District of New York.

Citation & Security for costs is waived.
Sept. 8, 1919.

ARCHIBALD COX,
Solicitor for Complainant.

85 [Endorsed:] District Court of the U. S., for the Southern District of New York. The Yale & Towne Mfg. Co., complainant-appellee, vs. Eugene M. Travis, as Comptroller of the State of New York, defendant-appellant. Original. Petition for Appeal. Charles D. Newton, Attorney-General, attorney for defendant. Capitol, Albany, N. Y. Filed Sept. 8, 1919.

86 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

E. 16-153.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,

vs.

EUGENE M. TRAVIS, Comptroller of the State of New York, Defendant.

It is hereby stipulated and agreed, that the foregoing is a tr transcript of the record of the said District Court in the abov entitled matter as agreed on by the parties.

Dated Sept. 8, 1919.

ARCHIBALD COX,
Attorney for Plaintiff.
CHARLES D. NEWTON, V. S. Y. I.,
Attorney for Defendant.

87 UNITED STATES OF AMERICA,
Southern District of New York, ss:

E. 16-153.

THE YALE & TOWNE MANUFACTURING COMPANY, Complainant,

vs.

EUGENE M. TRAVIS, Comptroller of the State of New York, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of th United States of America for the Southern District of New York, d hereby Certify that the foregoing is a correct transcript of the recor of the said District Court in the above-entitled matter as agreed o by the parties.

In testimony whereof, I have caused the seal of the said Court t be hereunto affixed, at the City of New York, in the Southern Distri of New York, this 8th day of September in the year of our Lor one thousand nine hundred and nineteen and of the Independen of the said United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern Distri of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 27,303. S. New York D. C. U. S. Term No. 548. Eugene M. Travis, as Comptroller of the State of New York, appellant, vs. The Yale & Towne Manufacturing Company. Filed September 19th, 1919. File No. 27,303.

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Supreme Court of the United States

October Term 1919

No. 548

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Appellant,

vs.

YALE & TOWNE MANUFACTURING CO.,
Appellee.

MOTION TO ADVANCE

CHARLES D. NEWTON,
Attorney-General of New York,
Solicitor for Appellant.

E. C. AIKEN,
Deputy Attorney-General of Counsel

ARCHIBALD COX,
Solicitor for Appellee.

SUPREME COURT OF THE UNITED STATES

EUGENE M. TRAVIS, as Comptroller of the STATE OF NEW YORK, *Appellant*,

against

YALE & TOWNE MANUFACTURING CO., *Appellee*.

To the Honorable Justices of this Court:

Now comes the Appellant herein and respectfully shows:

This is a case within the provisions of section 949 of the Revised Statutes, the enforcement of a revenue law of the State of New York having been stayed through the allowance against your petitioner of a perpetual injunction, restraining him as the collecting officer of the State from enforcing chapter 627 of the Laws of 1919 of New York, which is the New York Income Tax Law.

The District Court for the Southern District of New York held, in an opinion by Judge Knox, that this statute improperly discriminates between residents and nonresidents of the State, in violation of Article IV of the Federal Constitution and the Fourteenth Amendment, and is unconstitutional and void insofar as it affects nonresidents of the State.

Your petitioner has appealed to this court.

There are probably five hundred thousand persons who derive income from sources within the State of New York, and their taxability under this statute depends upon the decision of this Court in this suit. It is highly important to them that a prompt decision be made, and it is also highly important to the State, for if the act cannot be enforced it will make a difference of millions of dollars to the treasury of the State and the Legislature should know as soon as possible after it convenes in January, 1920, what must be done, if anything, to provide for the situation.

Wherefore, your petitioner, as the party claiming under the revenue laws of a state, the execution whereof is enjoined, respectfully moves that this case be advanced upon the calendar and that the Court set a day upon which argument will be heard.

The case of *Shaffer* v. *Carter* (No. 531), testing the constitutionality of the Oklahoma Income Tax Law is upon the calendar of this Court at this term, and a motion to advance its position has been made. It involves many of the questions raised in the instant case, and it is respectfully suggested that this case be set for argument at the same time therewith or at a time shortly thereafter, so that both cases may be heard before either is decided.

Dated Albany, N. Y., October 7, 1919.

CHARLES D. NEWTON,
Attorney-General of New York.
Solicitor for Appellant

The appellee joins in the foregoing application

ARCHIBALD COX,
Solicitor for Appellee.

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S

I

Supreme Court of the United States

No. 548

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Appellant.

vs.

YALE & TOWNE MANUFACTURING CO.,
Appellee.

APPELLANT'S BRIEF

CHARLES D. NEWTON,
Attorney-General of New York,
Solicitor for Appellant.

JAMES S. Y. IVINS,
Of Counsel.

INDEX

TABLE OF CASES CITED

TABLE OF CASES (Continued) PAGE

STATEMENT

This is an appeal, under section 238 of the Judicial Code, from a decree of the District Court for the Southern District of New York enjoining the enforcement of the New York Income Tax Law against non-residents, on the ground that it is unconstitutional under the Constitution of the United States. The bill of complaint demanded a perpetual injunction against the Comptroller of the State of New York prohibiting him from enforcing against the complainant the provisions of chapter 627 of the Laws of 1919 of New York, on the grounds that the statute violated the interstate commerce clause of the Constitution; that it impaired the obligation of contracts; that it deprived citizens of the States of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of the State of New York; that it abridged the privileges and immunities of citizens of the United States and deprived the complainant and its employees of their property without due process of law, and denied to them the equal protection of the laws. The defendant moved to dismiss the bill — in effect demurring. Judge Knox denied the motion, writing an opinion holding the act unconstitutional as violating section 2 of article 4 of the Constitution and the Fourteenth Amendment, in discriminating against non-residents in the exemptions allowed. The answer was then filed admitting the allegations of fact of the bill but denying the conclusions of law and upon the trial, in accordance with the accepted practice, Judge Mayer followed the decision upon the motion and granted the relief

prayed for in the bill. After the final decree was entered the defendant applied to this court. No questions are involved except the questions whether the statute violates the various sections of the Federal Constitution, with which the complainant claims it is in contravention.

A complete copy of the New York Income Tax Law is appended at the end of this brief, but the parts involved in this controversy may be summarized as follows:

Section 351 imposes an income tax upon every resident of the State with respect to his entire net income and "a like tax is hereby imposed * * * upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

In computing gross income non-residents are favored by section 359, paragraph 3, which provides:

> "In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article."

In computing net income from gross income certain deductions are allowed to residents which are not allowed to non-residents:

Section 360, paragraphs 5 and 6 provide for deduction of:

> " 5. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions within the state.
>
> " 6. Losses sustained during the taxable year of property not connected with the trade or business (but, in the case of a taxpayer other than a resident, only of property within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise."

It should be noted in this connection that the non-resident is not allowed to deduct losses on property, the profits from which would not be subject to taxation, paragraph 11 providing:

> " 11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the comptroller.

Section 263 providing for exemptions of $1,000 for a single man, $2,000 for a married man and $200 additional for each dependent, grants these exemptions only to residents, the section beginning:

" The following exemptions shall be allowed to any resident taxpayer."

Section 363 makes a provision for credit to non-resident taxpayers who have paid an income tax at home in a state which by its laws makes a reciprocal provision granting similar credit to residents of New York.

Section 366 provides for the deduction and withholding at the source of a tax upon income of non-residents derived by way of compensation for personal services. No similar provision is made with respect to residents, except that those who fail to file certificates showing their residence addresses within the state are treated, for the purpose of this section, as non-residents.

The complainant, a Connecticut corporation doing business in New York and elsewhere, has employees who are residents of New Jersey and Connecticut but who are occupied in whole or in part in the complainant's business in New York. A number of complainant's employees, who are non-residents of New York, perform substantially all of their services at the New York offices, and their salaries are paid at stipulated times in the City of New York from funds of the complainant within the State. Still other employees similarly situated have their salaries paid to them by checks sent by mail from the home office to such employees in New York. Still other non-resident employees are occupied in services which are rendered partly in Connecticut and partly in New York, some spending relatively little time in Connecticut and vice-versa, the amount of time spent in each place depending upon circumstances. The complainant also employs certain non-residents as traveling salesmen, who spend their time in New York and in traveling through other States.

The bill shows that if the complainant withholds from the salary of any employee an unconstitutional tax it will have no defense in an action by such employee for the amount withheld and that it therefore stands in the place of its employees. On behalf of such employees the complainant contends (we state these contentions in the order in which we take them up in this brief):

1. That it is beyond the sovereign power of the State to levy a general income tax upon non-residents.

2. That the act discriminates against citizens of other states in violation of § 2 of Article 4 of the Constitution.

3. That in violation of the Fourteenth Amendment the act denies to nonresidents the equal protection of laws.

4. That in violation of the Fourteenth Amendment the act deprives both withholding agents and nonresidents of property without due process of law.

5. That the act violates the commerce clause of § 8 of Article 1 of the Constitution.

6. That the act impairs the obligation of contracts in violation of § 10 of Article 1 of the Constitution.

SPECIFICATION OF ERRORS

Technically, the only error claimed is that an injunction was granted where none should have been. Practically, we consider ourselves aggrieved because the court below held the New York Income Tax Law unconstitutional as denying to citizens of other states the privileges and immunities of citizens of New York, and as denying the equal protection of laws; it being our contention that the act is constitutional in all respects.

POINTS

I

ON THE RIGHT OF THE STATE TO LEVY AN INCOME TAX ON NON-RESIDENTS.

a. Incomes a Proper Subject of Taxation

In view of the history of income taxation in England, the United States, and the several states, it can be accepted without argument that the power of taxation, inherent in a sovereign, includes the power to lay a tax upon incomes.

> "All subjects over which the sovereign power of a State extends, are objects of taxation."
>
> *McCulloch* v. *Maryland*, 4 Wheat, 316, 429.

b. Nature of Income Tax Immaterial

Whether a tax levied upon incomes from all sources is a direct or an indirect tax was a question of prime importance in considering the validity of federal income taxes, prior to the adoption of the Sixteenth Amendment, but it has no importance since the adoption of that amendment, and it never had any importance with respect to taxes laid by the states. The language in the opinions in *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601, to the effect that taxes on the income from property were taxes on that property, was merely a step in the logical argument adopted in reaching a conclusion that such taxes were in part direct taxes within the meaning of clause 5 of section 9 of article I of the Constitution. That the court will not be considered to have intended that language to establish as a

rule of law that an income tax is for all purposes a tax upon the property from which the income is derived, is clearly shown by the decision in *Peck & Co.* v. *Lowe,* 247 U. S. 165, to the effect that a tax on incomes generally is not a tax on exports within the constitutional prohibition, where it is levied on the income of an exporter. The court said of the federal income tax (at p. 174):

> "The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton* v. *Baltic Mining Co. supra,* p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminating way, but just as it is laid on other income."

It might be argued that an income tax is *sui generis* — neither a tax on property, on a privilege, nor on the person — but a tax on the right to receive income (*Peck & Co.* v. *Lowe, supra*); or it might be argued that it is a commutation tax or a composite tax. As a composite tax it might be said that in so far as it taxes the rent from real property it is a real property tax; in so far as it is a tax on the increased value of personalty, it is a personal property tax; in so far as it is a tax on the profits from the purchase and sale of property, it is an excise on sales or on commerce; in

so far as it is a tax on income from trade, profession or labor, it is a privilege tax; and in so far as it taxes residents on income from sources without the territorial jurisdiction of the sovereign, it is a pure personal tax. The characterization of a tax by administrative officers, by the phraseology of the statute, or the opinion of other courts, is not controlling. This court will look only at the practical *effect* of the tax as it is enforced.

In *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294, this court said:

> " we * * * are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. *Galveston, Harrisburg & San Antonio* v. *Texas*, 210 U. S. 217, 227; *St. Louis Southwestern Ry Co.* v. *Arkansas*, 235 U. S. 350, 362; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 231."

The statute in this case provides (§ 351):

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the

> rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

It is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology, so far as both are taxed. In so far as the tax extends to income of residents from sources without the State, there is no similar tax upon non-residents, but that is nothing for the latter to complain of.

It really does not matter whether this tax be regarded (so far as non-residents are concerned) as direct or indirect, a tax on the person, on property, or on privilege. States can and do levy all three kinds. The only question is whether the State has *power* to enforce this tax, and its nature does not assist in determining that question.

e. Power of Sovereign

Whether or not sovereign power to enforce a tax exists, depends solely on the ability of the State to collect it without extending its jurisdiction beyond its territorial boundaries. The sovereign can levy taxes on property which is tangible and within its boundaries, by its physical possession of that property. It can enforce taxes on privileges or rights, through preventing their exercise within its boundaries by those who do not pay. It can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out.

This inherent power in the sovereign extends equally to residents and to non-residents, to citizens and to aliens.

And the underlying reason for taxation: the support of the government in its protection of the lives, liberty and property of those having life, liberty or property within its borders, extends equally to residents and non-residents, citizens and aliens.

The best definition of taxation we have discovered was uttered by Judge Ingersoll in *Duer* v. *Small,* 4 Blatchf. 263, 7 Fed. Cas. No. 4116. He said (p. 264):

> " Taxes are a portion that each individual gives of his property, in order to secure or have the perfect enjoyment of the remainder. Governments are established for the protection of persons and property within the limits of the State; and taxes are levied to enable the Government to afford or give such protection. They are the price or consideration paid for the protection afforded. When the person of an individual receives the protection of the State by its laws, it is right that he should afford to the State, in the way of taxes, a recompense or consideration for such protection; for, otherwise, that protection could not be extended to him. Without taxes, the State would be powerless to afford protection; and, when the property of an individual receives the protection of the State, it is equally right that the property protected, no matter whether it be real or personal, should in such way yield a recompense or consideration. The owner of property within the limits of a State, no matter whether the property be real or personal, and no matter where the owner has his domicile has a right to call upon the Government of

> the State to protect such property by its laws and its officers acting under such laws. But such protection cannot be afforded, unless means, by the way of taxes, are furnished to afford the protection. And taxes are no more to be levied upon the property of the resident to protect the property of the non-resident, than taxes are to be levied upon the property of the non-resident to protect the property of the resident. The property of a non-resident within the limits of a State, whether it be real or personal, is equally protected by the laws with the property of a resident. There would appear, therefore, to be no good reason why it should not equally pay in taxes for such protection — no good reason why the non-resident, with the resident, should not give a portion, in order to secure the perfect enjoyment of the remainder."

This inherent power of the sovereign exists in each of the states except as restricted by the Federal Constitution.

> "Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of the taxation is unlimited, where the subjects to which it applies are within her jurisdiction."
>
> *State Tax on Foreign-held Bonds,* 15 Wall. 300, 319.

With the exception of matters prohibited by the Constitution specifically (such as exports, or interstate commerce), or impliedly (such as the activities of the national government), there is no doubt of the right of the state to tax *anything* which is within its territorial jurisdiction. The only constitutional questions that ordinarily arise in respect to modern taxation are (1) those of the

situs of intangibles, (2) those of the equal application of taxing statutes under the fourth article of the Constitution and the Fourteenth Amendment, and (3) those of due process of law.

d. Power to Enforce Income Tax

The question of the right to impose a tax on incomes of non-residents is not a question of the nature of the *tax* nor is it a question of whether income is property or the acquisition of it a right or a privilege; but it is a question of the *situs* of the income.

The doctrine that movable property follows the person for purposes of taxation has given way to the doctrine that where property has a *situs*, there it is taxable.

> *Bristol* v. *Washington County*, 177 U. S. 133.

The proposition that intangible property has its *situs* for the purposes of taxation at the domicile of the owner has been reiterated to the point where the logical underlying reason for it has been lost to many. The reason for regarding the *situs* of intangible property as the domicile of the person depends not on the meaning of *property*, but on the meaning of *situs*. That property is said to be taxable only at its *situs* is because *where property is taxable* — that is, wherever a sovereign can enforce a tax against it — *there it has a situs.*

In determining whether income has a *situs* for purposes of taxation in a given state, we should begin, not by saying: " Where is its situs? " that we may determine whether it is taxable, but

rather: "Can it be reached by taxation?" to determine whether it has a *situs* there. If it can be reached by taxation by a state — if the state can enforce a tax against it by due process of law — then it has a *situs* for taxation in that state. So we should look in drawing parallels, not to the conclusions of courts with respect to the *situs* of other intangibles, but to the reasons for those conclusions. We should not say that because some intangible has one *situs* at the domicile of the owner, no other intangible can have one elsewhere.

A state may not tax a non-resident on the ownership of stock of a foreign corporation, though the certificate be in the state, for the mere impounding of the certificate will not prevent the owner from selling his stock. The state has no means of enforcing the tax, and consequently the courts hold that the *situs* of the stock for purposes of taxation is not in the state. But the state of the domicile of the owner, having jurisdiction of his person may force him to pay a tax on it, hence it is held that its *situs* is at his domicile. *Hawley* v. *Malden*, 232 U. S. 1; or the state of domicil of the corporation may tax the shares of all stockholders, resident or non-resident, because it has jurisdiction to prevent the very existence of the corportion. *Corry* v. *Baltimore*, 196 U. S. 496. The same stock is thus taxable in two states, and to be so taxable it must have a *situs* in each.

A state cannot (except by denying to either the owner or the corporation some right disconnected with the ownership of the bond, and thus denying due process of law) force either the non-resident owner of a bond or the corporation which issued

it, to pay a tax on a bond not physically within the state and not made nor payable therein, nor secured by property therein. And so it is held that the bond has no *situs* for purposes of taxation in that state. *State tax on Foreign Held Bonds*, 15 Wall. 300. But if the state has jurisdiction of the person of the bondholder, it may force him to pay a tax on it, *Fidelity, &c., Trust Co.* v. *Louisville*, 245 U. S. 54; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Tappan* v. *Merchants National Bank*, 19 Wall. 490. If the state has jurisdiction of the corporation it may tax the bond (unless it was made and is payable without the state and secured by property without the state) by taking from the corporation some of the value of the bond and relieving the corporation to that extent from paying the bondholder. So it is held that the bond has a taxable *situs* at the domicile of the debtor. *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool, &c., Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346 (on page 355 of which the Foreign Held Bonds case is distinguished); *Blackstone* v. *Miller*, 188 U. S. 189. Or, where the bond so evidences the debt that the paper evidence can be sold as property, a state in which the bond is physically located may tax it, enforcing its tax by taking possession of it. And it is held that the bond then has a *situs* where it is located. *New Orleans* v. *Stempel*, 175 U. S. 309. *Board of Assessors* v. *Comptoir National*, 191 U. S. 388.

Thus a bond may be taxable in three different states at the same time. It has a *situs* in each of three states. *Mobilia sequuntur personam* ceases to be exclusive. The doctrine that intangibles follow the person has come to mean only that

they *can* be taxed at the domicile of the owner, not that they cannot be taxed elsewhere. As a matter of law, they can be taxed wherever a state can, as a matter of fact, enforce (by due process) a tax against them. The law follows the fact.

> "No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicil governs the whole. But those inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*, 116 U. S. 517, 524; *Knowlton* v. *Moore*, 178 U. S. 41."
>
> *Blackstone* v. *Miller*, 188 U. S. 189, 205.

The state by levying a tax which it has power to enforce *fixes* a *situs* of the thing taxed, within the state. In upholding a tax on non-resident memberships in local chambers of commerce, this court said:

> "But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the City of Minneapolis, and, we are of the opinion, * * * that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." (Citing cases.)
>
> *Rogers* v. *Hennepin County*, 240 U. S. 184, 191.

What is the fact with respect to a *tax on income?* A person receives income in one of three ways. It is (1) the product of property, or the money realized by the sale of such product, (2) the profit gained in the purchase and sale of property, or (3) the compensation for personal service. A state has power to enforce a tax on the product of property by seizing the product or the property, so long as they are in its territory; it has power to enforce a tax on the profits of bargain and sale by preventing the agreement, the delivery, or the payment within its borders, except upon the payment of the tax; it has power to enforce a tax on compensation for services by preventing the payment within its boundaries of the compensation or by preventing the rendition within its boundaries, of the services, except upon the payment of the tax.

The exercise of a privilege is in the nature of a property right or in the nature of the rendition of personal service, but in either case, if exercised in the state, the state may tax it. *Rogers* v. *Hennepin County*, 240 U. S. 184.

In each of these cases the State has *power* to enforce its taxes equally against residents and against non-residents. It follows that in law the income from each of the divisions has a taxable *situs* in the state, regardless of whether it may have another elsewhere. The law follows the fact. And the fact is that the state can enforce its tax against non-residents as well as residents. The domicile of the recipient of income has nothing to do with it. The *fact* of the *power* remains, even if he removes his domicile from the state, even if he has never been near the state.

The power is obvious. The only limitations on the exercise of that power are that it must be exercised with respect to taxes which do not deny to citizens of one state the rights, privileges, and immunities of citizens of another state, or deny the equal protection of laws, and that its exercise shall be through due process of law, and shall not interfere with interstate commerce nor impair the obligation of a contract.

II

THE NEW YORK INCOME TAX LAW DOES NOT DENY TO CITIZENS OF ANY STATE ANY OF THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE SEVERAL STATES.

Clause 1 of section 2 of article IV of the Federal Constitution is in effect almost paraphrased by section 1 of the Fourteenth Amendment. The latter is broader, but any statute which violates the former would certainly be in violation of the latter. In effect the former provides that a *citizen* of another state shall not be discriminated against merely because of his citizenship, while the latter protects all persons against unreasonable discrimination. For this reason everything that is said under title III, below, applies equally well upon this point, but there are a few things which can be said under this title that would have no necessary bearing under title III, hence we have refrained from consolidating the two.

Citizens of other states, as *citizens,* and only as such, are protected by article IV, section 2, clause 1. So, if there is no discrimination against them *as citizens*, the provision is not violated.

There is no discrimination in the New York income tax law in favor of citizens of one state as against citizens of any or all others. The word " citizens " is not found in the statute. It is true that distinctions are drawn between residents and non-residents, but this is regardless of citizenship — non-resident citizens of New York are treated like all other non-residents, and citizens of other sovereigns who are resident in New York are treated exactly like resident citizens.

Section 1 of the Fourteenth Amendment provides that citizens of the United States are citizens of the state wherein they reside. But the terms " reside," " residence " and " resident " have different meanings at different times. They have different meanings in different statutes, and sometimes in different parts of the same statute. Text writers on conflict of laws have always drawn a distinction between *residence* and *domicil.* They say a man may have several residences, but only one domicil. But it is evident that a citizen of the United States cannot be simultaneously a citizen of several different states, by having a residence (as the text writers use the term) in each of them. The term " reside " in the Fourteenth Amendment probably means to " be domiciled;" or, to use a phrase commonly understood among the people, to " maintain a voting residence." It does not mean to " maintain a voting residence." It does not mean to " have a place of abode,"— especially if one has several places of abode. It implies permanence, though the word, in other connections, does not necessarily carry any such implication. The defendant in this case has already had submitted to

him a question by a prospective taxpayer, inquiring as to his classification, who says: " My regular residence is in New York, but I maintain a voting residence in Philadelphia." *Residence* in the ordinary acceptance of the term, in the sense in which the text writers mentioned use it, is a matter of physical locations of persons and houses, while *domicil* depends further upon intent—upon *animus manendi* and *animus non revertendi.* Citizenship in a state likewise depends largely upon intent. The terms *resident* and *citizen* are not normally synonymous and are not rendered exclusively so by the use in the Fourteenth Amendment of the word " resident " in one of its many meanings.

This court said, in *La Tourette* v. *McMaster*, 248 U. S. 465, 470:

> " The court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so, and by doing so it avoids discrimination. In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other states, residence and citizenship being different things."

In that case *three years' residence* was required by the statute before one could be an insurance broker, but the court did not regard it as discriminatory against citizens of other states.

That residence may be in some cases a proper basis for legislative classification is a theme elaborated upon in title III, below, but it is settled that where residence *is* a proper basis for classification, the adoption of such basis is not violative of article IV, section 2, clause 1.

In *Travellers Ins. Co.* v. *Connecticut,* 185 U. S. 364, this court upheld a classification in a taxing statute of resident stockholders in one class and non-resident stockholders in another, and ruled that it did not violate the constitutional equality of citizens of the different states.

An early New York statute, restricting imprisonment for debt, abolished that form of execution against residents, but left it effective against non-residents. The act was held not to violate article IV, domicil and residence being distinguished. *Frost* v. *Brisbin,* 19 Wend. (N. Y.) 11.

In *Chemung Canal Bank* v. *Lowery,* 93 U. S. 72, this court paraphrased a state statute of limitations in these words (p. 76):

> "This statute may be expressed shortly thus: when the defendant is out of the State, the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall, if he resides out of the state."

And the court held that statute constitutional.

An ordinance giving resident owners of property a right to protest against an assessable improvement and denying it to non-resident owners, was upheld in *Field* v. *Barber Asphalt Paving Company,* 194 U. S. 618.

Statutes authorizing writs of attachment against the property of non-residents and denying them in similar cases against the property of residents are common everywhere. If they violated article IV they would not be tolerated. That they do not was settled in *Central Loan and Trust Company* v. *Campbell Commission Co.,* 173 U. S.

84, and in *Blake* v. *McClung,* 172 U. S. 239, where this court said (pp. 256–257):

> "We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established."

If the word "resident" used in the New York statute can reasonably have a different meaning from that of the word "reside" as used in the Fourteenth Amendment, there is no discrimination against non-residents on account of their *citizenship,* nor against *citizens* of other states. If the word is subject to construction, the legislature will be presumed to have intended it to receive the construction which renders the act constitutional, not that which renders it void.

III

THE NEW YORK INCOME TAX LAW DOES NOT DENY TO ANY PERSON THE EQUAL PROTECTION OF THE LAWS.

The statute is attacked on the ground that it violates the Fourteenth Amendment (A) in granting certain exemptions and allowing certain deductions to residents, which are not allowed to non-residents and (B) in providing different methods for collecting from residents and non-residents.

A

The discriminations between residents and non-residents in exemptions and deductions are reasonable, proper, and constitutional.

(a) Classification in Taxation is a Proper Exercise of Legislative Power.

There is no room for argument on the proposition that in providing for taxes, a legislature not only may, but practically must classify the objects of taxation. The greatest injustice and

hardship would otherwise occur. As was said in *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 351:

> "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

and in *Barrett* v. *Indiana,* 229 U. S. 26, 29–30:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make the laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' This was one test laid down in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, and has been quoted and followed with approval in *Williams* v. *Arkansas, supra;* and *Watson* v. *Maryland, supra.*"

and again in *Giozza* v. *Tiernan*, 148 U. S. 657, 662:

"Nor, in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339."

This classification may discriminate between classes in rates of taxation, *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283; *Michigan Central R. R.* v. *Powers*, 201 U. S. 245; or in exemptions from taxation, *Beers* v. *Glynn*, 211 U. S. 477. In the latter case this court said:

"The power of the State in respect to the matter of taxation is very broad, at least so far as the Federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method." (p. 484).

and:

"Indeed, it may be laid down as a general rule that mere inequalities or exemptions in the matter of State taxation are not forbidden by the Federal Constitution." (p. 485.)

and in *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237:

"The provision in the Fourteenth Amendment, that no State shall deny to any person

within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constituion. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of

> society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

and in *Citizens' Tel. Co.* v. *Fuller*, 229 U. S. 322, 329:

> " The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature."
>
> *   *   *   *   *
>
> " It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation."

And it follows that a taxing statute is not invalid because of simple inequality between classes. This court said in *Int. Harvester Co.* v. *Missouri*, 234 U. S. 199, 210:

> " Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the State. And we shall presently see that power has very broad range. A classification is not invalid because of simple inequality. We said in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, 106, by Mr. Justice Brewer, ' The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.' "

It would seem that the only restriction on the power of classification is that there must be real differences between the situations of the different classes. As the court said in *Northwestern*

Mutual Life Ins. Co. v. *Wisconsin*, 247 U. S. 132, 138:

> "That the State is not because of the Fourteenth Amendment required to tax all property alike, and may classify the subjects selected for taxation, is too well established to require citation of the many cases in this court which have so held. The classification may not be arbitrary and must rest upon real differences — subject to these qualifications the State has a wide discretion."

What constitutes a real difference depends upon the purpose and extent of the legislation and all the circumstances of the subjects and objects thereof. For purposes of taxation there is no real difference between a man of thirty and a man of eighty, between a man weighing 165 pounds and one weighing 350 pounds, but when it comes to calling the militia or organizing a police department there is a real difference between the two men. And *per contra*, for militia duty there is no difference between the man with a thousand dollar income and the man with a million dollar income, but for purposes of taxation there is a vast difference. In adopting militia laws, the legislature classifies men according to their fitness to serve and the situation of their dependents. In adopting codes of legal procedure the legislature classifies men according to the facility with which they may be subjected to the jurisdiction of the court: requiring personal service on residents but permitting service by publication against non-residents, requiring security for costs from non-residents but not from residents, authorizing writs of attachment of the property or even the persons of non-residents but not of residents.

In tax legislation the legislature classifies men according to occupation, according to the nature or quantity of their property, or its taxability, or according to the facility with which the tax can be enforced. In each case there must be some real difference connected with the subject or object of the legislation.

On the subject of legislative classifications this court not long ago expressed the general rule and also enumerated many classifications which had been upheld. *Tanner* v. *Little*, 240 U. S. 369, where the court said (pp. 382–383):

> " Classification is not different in law than in other departments of knowledge. ' It is the grouping of things in speculation or practice because they " agree with one another in certain particulars and differ from other things in those particulars." ' *Billings* v. *Illinois*, 188 U. S. 97, 102. Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject matter is hence to be considered. It may not make the distinction adverted to but it may make others the appropriateness of which, considered logically, may be challenged, for instance: between sales of

stock upon margin or for immediate or future delivery (*Otis* v. *Parker*, 187 U. S. 606); between acts directed against a regularly established dealer and one not so established (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157); in an inspection law, between coal mines where more than five men are employed and coal mines where that or a lesser number are employed (*St. Louis Cons. Coal Co.* v. *Illinois*, 185 U. S. 203); and a like distinction in a workmen's compensation law (*Jeffrey Mfg. Co* v. *Blagg*, 235 U. S. 571); between a combination of purchasers and a combination of laborers; (*International Harvester Co.* v. *Missouri*, 234 U. S. 199); **between residents and non-residents** (*Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364); in a law requiring railroads to heat passenger coaches, between roads of 50 miles and roads of that length or less (*N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 628; see also *Dow* v. *Beidleman*, 125 U. S. 680; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688); between theatres according to the price of admission (*Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61); between land owners as to liability for permitting certain noxious grasses to go to seed on the lands (*Missouri, Kansas & Texas Ry.* v. *May*, 194 U. S. 267); between businesses, in the solicitation of patronage on railroad trains and at depots (*Williams* v. *Arkansas*, 217 U. S. 79); and a distinction based on the evidence of the qualifications of physicians (*Watson* v. *Maryland*, 218 U. S. 173, 179)."

(b.) The Classification of Residents and Non-Residents by the New York Income Tax is Reasonable.

There is a real difference between residents and non-residents in many matters. Undoubterly there is a difference between residents and

non-residents in the elective franchise and the right to hold office. Nobody would ever suggest that a man was being deprived of his rights, privileges and immunities or of the equal protection of the laws in that he was refused the right to vote at a general election or take public office in a state where he did not reside. In police matters there is often a real difference between residents and non-residents, and it is reasonable to provide that only residents may enter given occupations. *La Tourette* v. *McMaster*, 248 U. S. 465. The only right of the non-resident, if he wishes to carry on such a occupation, is the right to became a resident, and get into the proper class. In legal procedure there is a real difference between residents and non-residents, based upon the facility with which they can be brought into court and the means by which the court can enforce its decrees against them. And classification on the basis of this difference is upheld. (See cases cited on pp. 20–22 *ante*.)

In taxation there may be a real difference between residents and non-residents — not in their ability to pay perhaps, but in the extent to which the state has jurisdiction to tax them, and the facility with which the state can enforce its tax.

In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, this court upheld a state law taxing domestic life insurance companies on one basis and foreign companies upon another, saying (p. 139):

> "The state court held, and we think properly so, that foreign insurance companies occupy a relation to the State which is different from that of a domestic company. The latter has within the borders and taxing

> jurisdiction of the State a large amount of personal property, receiving protection, and subject to taxation. The foreign company has its reserves in the State of its domicile, and there subject to local taxation, which is of itself a substantial difference."

Is there not a similar and equally substantial difference between residents and non-residents under the New York income tax? Non-residents, like the foreign corporations in the cited case, have property without the state from which they derive income which is not subject to taxation by the State of New York, but residents can be and are taxed by the State of New York on income derived from property wherever located. Non-residents may derive income without the state from occupations, and the state cannot tax them, though it can and does tax its residents on income derived from occupations wherever carried on. The residents, generally, can be and are subjected to greater taxation than the non-residents, because there is a real difference between them — in the jurisdiction of the state to enforce taxes — and they are properly classified in two classes (which we shall designate as A and B), class A subjected to a tax on all income and class B subjected to a tax only on income from within the state. And the same classification is proper when we turn to the credit side of the ledger and grant exemptions. Class A gets exemptions of $1,000 and $2,000 under section 362 of the New York statute, with $200 extra for each dependent, while class B does not get them. Class A may deduct losses on property without the state (paying taxes on income from that property) but class B may

not (any more than it pays taxes on income therefrom). Whether class A or class B really has the better of it is entirely a question of how one postulates the facts in his hypothetical example. The plaintiff thinks of cases such as this: X, residing in New Jersey, earns all his income, $5,000, in New York — he pays $50 tax; while Y, residing in New York and earning $5,000, in New York or in New Jersey pays only $30 — claiming the married man's exemption $2,000. But the defendant postulates this: X lives in New Jersey, Y in New York, each derives $5,000 income from sources in New York and $5,000 from sources in New Jersey. X would pay $50, but Y would pay $80 (even after claiming exemption on $2,000).

Professor Seligman, who, as an expert on taxation assisted the legislative committee in drafting the New York income tax law, explained the purpose of the drafters and the reasons underlying that purpose in a memorandum to the Attorney-General of the State; that memorandum contains the following language, pertinent upon this point:

> "Residents of a state or citizens of a country ought to be subjected to the general income tax on their entire income, no matter from what source derived. On the other hand non-residents or foreigners should be subject only to the special income taxes; that is to say they should be liable only on such income from special sources as is received or earned within the state. In other words, the income from land or other property situated within the state, or from business, professions or occupations carried within the state, ought to be taxable to non-residents as well

as to residents. Where there are no special income taxes, but only a general income tax, the same principle would apply: residents would be taxable upon their entire income; non-residents only upon the income received or earned within the state.

This solution satisfactory so far as it goes, is open to the criticism that if two states impose a similar tax and follow the same principle they may create cases of unjust double taxation. For if individual A earns his money and spends it in one state, he would be taxed only once on his entire income; while individual B with the same income who earns his money in one state and has his legal residence in another would be taxed twice — once by the state where the income is earned and again by the state where he resides. An escape from this difficulty is to be sought in a provision whereby the state where the income is earned would permit the non-resident to make a proportionate deduction of such tax on such income earned within the state from the tax, if any, which might be levied by the state of his residence. [cf. § 363].

It might, indeed, be asked why a simpler solution would not be to cut the Gordian knot and to leave non-residents scot-free, so that each state would tax only its own residents on their entire income. Why should we not content ourselves with levying a general income tax, and make no attempt to levy special income taxes? The answer is that many states do not impose an income tax at all; and that even if they do impose an income tax, there is no assurance that it would be assessed at the same rate. In default of any such assurance, it is more equitable to impose the same burden upon residents and non-residents alike, so far as the income derived from

sources within the state is concerned. That is to say, both residents and non-residents would in theory be subject to precisely the same special income taxes, and residents would then be subject to something in addition — namely that part of the general income tax not included in the special income taxes. Why for instance, if the state of New Jersey imposes no income tax on its own should its residents who carry on their business in New York in competiton with New Yorkers be exempt from taxation in New York on that business? To erect this exemption into a general rule would not only result to the disadvantage of the New Yorkers who are conducting their business or pursuing their occupations in New York side by side with the Jerseyites but it would have also this most important practical consequence that every New Yorker who desired to escape his taxes could easily do so by transferring his legal residence to his country home where he happens to live during the summer months. In fact the chief reason why the general property tax has broken down in New York [City], is the facility afforded to wealthy New Yorkers to claim their legal residence in the environment of the city. The great advantage of the income tax over the property tax is that it tends to decrease this tendency. But this result would be entirely defeated if non-residents were exempted on their incomes earned within the state of New York. It is precisely to put a stop to this deplorable practice of local expatriation that the provision which taxes non-residents on their income earned within the state becomes of such great significance.

Any possible hardship to the *bona fide* non-resident, moreover, can be obviated by an arrangement providing for the avoidance of

double taxation. Such an arrangement is contained in the New York law which provides in section 363 as follows:

'Whenever a tax-payer other than a resident of the state has become liable to income tax to the state or country where he resides upon his new income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws.'

In the deliberation of the Committee to which was assigned the duty of laying down the principles and of drafting the law, this problem aroused protracted discussion. The solution as contained in the law was suggested by the present writer and found favor with the Committee.

The practical working out of the system would then be as follows: If New Jersey, for instance, imposed no income tax at all the Jerseyite would be subjected to taxation in New York on his income earned within the state. To this there can be no possible objection. If two contiguous pieces of land were owned respectively by a New Yorker and a Jerseyite, there is surely no reason why the latter should be exempted on his income therefrom. If two neighboring and competitive business houses were occupied respectively by a New Yorker and a Jerseyite, there is

again no reason why, in the absence of any tax on the Jerseyite by his own state, the two competitors should not be treated equally. If two dentists, one a New Yorker and the other a Jerseyite carried on their profession on opposite sides of a street in New York, there is no possible reason why, in the absence of any tax by the state of New Jersey, the Jerseyite should be preferred to the New Yorker. Far from imposing any additional burden upon the Jerseyite, or interfering in any way with interstate commerce, the taxation of the Jerseyite would bring about scrupulous equality in treatment with that of the New Yorker. To do less than this would give him an unjustifiable preference.

As a matter of fact, however, such a preference is actually given to him in one respect. While the resident is taxed on his entire income including the income from intangible property, the non-resident is exempt from an income tax on his intangible, unless these are employed in his business. [cf. § 359, ¶ 3.] This preference to the non-resident is explicable on the ground that otherwise the market for New York securities and the very preeminence of New York as a financial center might be threatened. Inequality of taxation in favor of the non-resident is preferable to the decay of New York. But the point remains that in this respect non-residents are actually favored.

On the other hand, the principle provides that if New Jersey should levy an income tax, New York would allow the Jerseyite to deduct from the New York tax a proportionate part of the tax levied by New Jersey. This permission in justice should be subject to the condition, actually found in the New York law, of reciprocity i.e. that New Jersey would agree to treat New Yorkers in pre-

cisely the same way. The consequence of this would be that if New Jersey imposed an income tax at the same rate as that of New York, the Jerseyite would in final result pay nothing in the State of New York but would pay an equivalent tax in the State of New Jersey. This would operate to prevent the one great evil alluded to above viz. the inducement on the part of wealthy New Yorkers to claim a legal residence in New Jersey. For if they were to be taxed to the same extent by New Jersey, the inducement to emigrate would disappear. It is only in the case that the income tax of New Jersey might be imposed at a lower rate than that of New York that the Jerseyite would be taxable in New York on the difference. This result, however, is perfectly defensible. For not only would it operate to prevent the emigration of New Yorkers, but it would subject *bona fide* Jerseyites to the same burden as those borne by their New York competitors. It would not impose any additional burden on them and it would therefore not create any discrimination against citizens of another state.

The solution of the problem contained in the New York law therefore really constitutes a distinct step in advance in the equiable treatment of non-residents. In subjecting non-residents to taxation on their income derived from sources within the State, the New York law does not differ from either the Federal law or from any other important income tax law. For in every country almost without exception foreigners are taxed upon their income from sources within the country. The chief difference between the New York law and that of most countries is that in the latter case no such equitable provision is made for a proportionate and reciprocal deduction of the tax where the home country

imposes a tax on the same income. The avoidance of double taxation in such case is generally left to particular treaties between the respective countries. The New York law hence marks a decided step forward in the treatment of this important problem. Residents and non-residents alike are subjected to certain special income taxes; residents are subjected in addition to a general income tax and non-residents are freed from double taxation by a reciprocal deduction which operates similarly to free residents from double taxation by a sister state. The net result is equality all around.

In all other important respects save one, non-residents and residents are treated alike in the New York law. This one exception has to do with the question of exemption. In the case of resident tax-payers the New York law allows an exemption of from $1,000 to $2,000 according to whether the tax-payer is single or married, together with $200 for each dependent person. It might be claimed that the absence of any such exemption in the case of non-residents constitutes a discrimination. as a matter of fact, however, there is no reason for such a complaint.

The theory underlying the law is, as we have seen, that the state of residence may also impose an income tax. If New Jersey or Connecticut, for instance, were to impose an income tax, it could avoid all possible injustice to its residents on the part of New York by permitting a similar exemption. Under the reciprocal provision of the New York law, mentioned above, all difficulties would then be at once adjusted. For if the Jerseyite carrying on business in New York paid in New Jersey a tax on his total income, he would automatically receive the exemption in question, and as his tax in New York would then be deducted he would not suffer any unjust discriminative burden. There are only

two possible cases where there might be a chance of unequal treatment.

In the first place New Jersey might decide not to allow any exemption at all in its income tax, in which case the Jerseyite receiving his income in New York would no doubt be unfairly treated as compared with the New Yorker. This, however, would be due to the action of New Jersey, not of New York. The New York law goes as far as it is proper to go. To do more than this would be to prefer the non-resident. For if both New York and New Jersey granted an exemption, the New Jerseyite would pay on the excess over \$4,000, the New Yorker on the excess over \$2,000. A law which contemplates equal and reciprocal treatment of residents and non-residents alike cannot well be charged with discrimination simply because it is within the power of a sister state to cause this discrimination to its own citizens.

The second possible case of unequal treatment might occur where New Jersey does not impose any income tax at all and where the income of the Jerseyite is wholly or almost wholly earned within New York. In that case, and only in that case — not contemplated by the law, the framers of which confidently looked forward to the speedy adoption of an income tax by the adjoining states — the non-resident would be treated more severely than the resident. Residents and non-residents could in such a case be placed on exactly the same footing by permitting the non-resident to file a declaration of his entire income, within or without the State of New York and granting him such proportion of the statutory exemption as his income within the state bears to his entire income. Such an arrangement would, however, be exceedingly cumbersome and difficult to control."

We regard the case of *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364 as being directly in point upon the issues in this case. The Connecticut tax law taxed resident and nonresident stockholders of corporations in different ways. Resident stockholders were taxed through the local tax officers, a local tax, at the rates fixed for the localities. Nonresident stockholders were taxed directly by the state government, a state tax, at a fixed rate. The resident paid no state tax, the nonresident paid no local tax. There was, as a result of varying rates of local taxation, in some localities a difference in the *rate* of taxation. And a further difference was made—the tax was based upon the market value of the stock as reported by the corporations, but in local assessment of resident stockholders the act provided:

> "but so much of the capital of any such company as may be invested in real estate, on which it is assessed and pays a tax, shall be deducted from the market value of the stock, in its returns to the assessors." (p. 365.)

No similar deduction was permitted in the taxation of nonresidents, but the tax was collected at the source, through the corporation, at a fixed rate of one and one-half percent on the entire market value. The statute was attacked as discriminating against nonresidents in violation of Article IV of the federal Constitution and the Fourteenth Amendment. This court upheld the tax, saying (pp. 366–369):

> "The single question presented for our consideration is whether this legislation of the

State of Connecticut in respect to the taxation of the shares of stock in a local corporation held by non-residents is in conflict with paragraph 1 of section 2 of article IV of the Federal Constitution, or the Fourteenth Amendment thereto. It is alleged that there is such discrimination between resident and non-resident stockholders as works a denial of the equal protection of the laws, and to the prejudice of citizens of other states. The stock of the non-resident stockholder is assessed at its market value without any deduction on account of real estate held by the corporation. The stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax. As thus stated, there would appear to be a wrongful discrimination, and that the non-resident stockholder was subjected to a larger burden of taxation than the resident stockholder, and this not as a result of the action of any mere ministerial officers in making assessments, but by reason of the direct command of the statute to include the real estate in the valuation in the one case and to exclude it in the other.

" But this apparent discrimination against the non-resident disappears when the system of taxation prevailing in Connecticut is considered. By that system the non-resident stockholder pays no local taxes. He simply pays a state tax, contributes so much to the general expenses of the State. While on the other hand, the resident stockholder pays no tax to the State but only to the municipality in which he resides. In other words, the State imposes no direct taxes for its benefit upon the property belonging to residents, but collects its entire revenue from corporations, licenses, etc. The rate of State tax upon the non-resident stockholder is fixed, fifteen mills

on a dollar, applying equally to all, while the rate of local taxation varies in the several cities and towns according to the judgment of their local authorities as to the amount necessary to be raised for carrying on the municipal government. Obviously the varying difference in the rate of the tax upon the resident and the non-resident stockholders does not invalidate the legislation. How then can it be that a difference in the basis of assessment is such an unjust discrimination as necessarily vitiates the tax upon the non-resident? The resident stockholder does not pay the fifteen mills to the State which is demanded of the non-resident, and the non-resident stockholder does not pay to any locality the sum, greater or less than fifteen mills, which may be imposed by the authorities of that locality. * * *

* * * "In other words, the State, dealing with the question of taxation of the shares of stock in a local corporation, found two classes; one, shares held by residents, and the other, those held by non-residents. It was believed that a resident in a city or town, enjoying all the benefits of local government, should be taxed for the expenses of that government upon all the property he possessed, whether that property consisted in part or in whole of shares of stock. On the other hand, the non-resident, enjoying little or none of the benefits of local government, was exempted from taxation on account of the expenses of such local government. At the same time it was not right that he should escape all contribution to the support of the State which created and protected the corporation and the property of all its stockholders, and so a tax was cast upon the non-resident stockholder for the expenses of the State. This, with kindred taxes, has been found sufficient to pay the running expenses

> of the State government. The resident is not called upon to pay any of the expenses of the State, but only to bear his proportional share of those of the municipality. The non-resident is called upon to pay no share of the expenses of the municipality, but only to contribute to the support of the State."

A more exact parallel to the situation in the case at bar could hardly be drawn. In the case at bar residents are taxed on net income from whatever source, nonresidents only upon the net income from property and from business, trade, profession or occupation carried on in the state. In the Connecticut case, residents were subjected to local taxation and nonresidents to state taxation. If anything our statute would seem to be less discriminatory, for the rate is uniform for residents and nonresidents, while in the Connecticut statute it was not. The principle of the exemptions and deductions allowed to residents and denied to nonresidents in our statute, has the same basis as the deductions allowed under the Connecticut law to residents only — that they are taxed in other ways, where the nonresidents are not.

The fact (if it be true) that the exemptions and deductions allowed in the New York statute are greater than those allowed in the Connecticut law, has nothing to do with the validity of the statute. If the *power* to levy a tax exists, the *rate* fixed will not render it unconstitutional. *Tanner* v. *Little*, 240 U. S. 369. The power to exempt certain things to the exclusion of others follows the same rules as the power to tax certain things, to the exclusion of others — it is only another way of stating the same proposition. And if the rate is immaterial in determining con-

stitutionality as to *taxation*, so the rate of *exemption* is immaterial.

In the Connecticut case, counsel attacking the law postulated situations in which nonresidents would have to pay more taxes on the same stock than would residents. But the court postulated other situations where the opposite would be true, just as we have met the hypotheses of the plaintiff with counter hypotheses (p. 33 above). It is settled that mere hardship in imaginable or actual cases will not vitiate a tax, and further:

> " It is established that a distinction in legislation is not arbitrary, *if any state of facts reasonably can be conceived that would sustain it*, and the existence of that state of facts at the time the law was enacted must be assumed." (Italics ours.)
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> *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357.

As the court said in *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S., 251, 256:

> " It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an *exact* exclusion or inclusion of persons and things. See *Gulf, etc. Co.* v. *Ellis,* 165 U. S. 150, and the cases cited; *Missouri, etc. Co.* v. *May,* 194 U. S. 267."

It is said that Governor Smith has conceded the law to be impolitic, but that is not a matter with which this court will concern itself. As was said in *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 293.

> " it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. *Nor with the impolicy of a law has it concern.* Mr. Justice Field said in *Mobile County* v. *Kimball*, 102 U. S., 691, that this court is not a harbor in which can be found a refuge from ill advised, unequal and oppressive State legislation. And he observed in another case: ' It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.' " (Italics ours).
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> "And so Mr. Justice Miller, speaking for the court in *Davidson* v. *New Orleans*, 96 U. S. 97, 105, said: The Federal Constitution imposes no restraints on the State in regard to unequal taxation." (p. 295).
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> * * * * * * * *
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> " And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates ' equally and uniformly upon all persons in similar circumstances.' " (p. 296).

We, as appellants, have necessarily anticipated as far as possible the attack of the plaintiff's counsel upon the constitutionality of the statute, but in so doing we have not shifted the burden of demonstrating that the classification is not made upon a reasonable basis. That burden is still

upon the plaintiff. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61. In that case the court summarized as follows (p. 78):

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachte* v. *Wilson*, 204 U. S. 36, 41; *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Munn* v. *Illinois*, 94 U. S. 113, 132; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 615."

That case involved the police power. But the power of classification in taxation is equally broad. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329.

In short: The legislature has power to classify on reasonable basis; the basis of classification of residents and nonresidents in this case is a rea-

sonable one; there is no contention that this law does not operate equally on all those in the same class; inequality as between members of different classes, or hardships in special cases, does not vitiate the statute.

B

The different methods of collection provided by the statute for the tax on income received by way of compensation for personal services by residents and by nonresidents, does not deprive any person of the equal protection of laws.

The statute follows the form of the present federal income tax law in providing for withholding at the source only against nonresidents. A resident, earning personal service compensation, makes his own return and pays his tax to the Comptroller, while nonresidents are subject to withholding at the source of the tax on their personal service compensation earned within the state *if they do not elect to make their own returns and pay their own taxes.*

That a nonresident *may* make his own return, as a resident *must* make it, and thereby be relieved from any withholding at the source, is in itself an answer to the proposition that he is unduly discriminated against. But even if he were not given this option, the discrimination is a proper and reasonable one.

In making legislative classifications not only the purpose of a law must be considered, but also the means of its administration — the ways in which it may be defeated.

St. John v. *New York*, 201 U. S. 633, 637.

Where a person receives no income except compensation for personal service, an income tax may be enforced against him, if a resident, through personal action, but if he be a nonresident it can only be enforced by interference with the rendition of the service or with the payment of the compensation. This constitutes a real difference in the situations of the two classes, sufficient to justify their separate classification and different treatment. And so long as all members of a class are treated alike, the constitution is not violated.

There are many decided cases in which different methods of procedure against residents and against nonresidents have been upheld.

In *Tappan* v. *Merchant's National Bank,* 19 Wallace 490, this court said (p. 505):

> "The constitution does not require uniformity in the matter of collection. Uniformity in the assessment is all it demands. When assessed the tax may be collected in the manner the law shall provide; and this may be varied to suit the necessities of each case."

In *District of Columbia* v. *Brooke,* 214 U. S. 138, this court upheld a congressional drainage act affecting the District of Columbia and providing for its enforcement by civil process against nonresidents and by criminal process against residents. After pointing out that the prohibition against discrimination in federal laws cannot be stricter nor more extensive than that of the Fourteenth Amendment is upon the states, the court went on to say (p. 150):

> "That Amendment is unqualified in its declaration that a State shall not "deny to

any person within its jurisdiction the equal protection of the laws." Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary — that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. *Billings* v. *Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al.* v. *Worst*, 207 U. S. 338. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *S. John* v. *New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration — the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field* v. *Barber Asphalt Co.,* 194

U. S. 618, where a privilege to protest against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statue held not to violate the equality clause of the Fourteenth Amendment. See *Travellers Ins. Co.* v. *Connecticut*, 185 U. S. 364.

" It is not contended that the act of Congress is not impartial within the classes. The act treats all resident lot owners alike and all non-residents alike. It is contended that there is a difference in the procedure prescribed in case of default, and non-resident lot owners are thereby discriminated against, though they stand in the same relation to the purpose of the law as resident lot owners. In other words, non-resident lot owners are not treated the same as resident owners in like situation, because against resident owners the coercion of the law is by criminal punishment, while against non-resident owners the remedy is by civil proceedings, the District does the work that the non-resident owners neglect and charges the expense thereof on their property. This is a distinction, a discrimination it may be called, but it has even more justification than that sustained in *Field* v. *Barber Asphalt Co., supra.* The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to preserve the health of the city. There is a difference only in the manner of enforcing it, a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification."

In sustaining a statute requiring a bond on attachment in an action against a resident but not in an action against a non-resident, this court said, in *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84, 97–98:

> " III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issuance of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the territory, it is said, in case of an attachment, for the cause stated, against a resident of the Territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a non-resident. This, it is argued, is a discrimination against a non-resident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class and non-residents in another, but it is insisted that where non-residents 'are not capable of separate identification from residents by any facts or circumstances other than that they are non-residents, that is, when the fact of non-residence is their only distinguishing feature — the laws of the state or territory cannot treat them to their prejudice upon that fact as a basis of classification.'
>
> " When the exception, thus stated, is put in juxtaposition with the concession that there is such a difference between the resi-

dents of a state or territory and non-residents, as to justify their being placed in distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule, which the argument attemps to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question."

Many statutes taxing corporate shares and requiring the corporation to withhold at the source against non-residents but not against residents have been upheld. Typical of the decisions in these cases are *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364, quoted above, and *Merchants' and Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, where the court said (p. 463):

"If it be said that the lack of uniformity renders the statute obnoxious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to 'deny to any person within its jurisdiction the equal protection of the laws,' it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and

whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the State should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution.

"Again, it will be perceived that this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation. It is common practice in the States to offer a discount for payment before the specified time, and impose penalties for nonpayment at such time. This, of course, results in inequality of burden, but it does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all."

These cases are directly in point in the case at bar. The cases cited under title II above (pp. 21-22) are also in point on this question.

The plaintiff's counsel, in the lower court, argued that the requirement of section 366 that two per cent. be withheld constituted a further discrimination as well as a deprivation of due process of law, in cases where the tax rate is only one per cent. As Judge Knox pointed out in his opinion, this provision of the statute is obviously due to inadvertence in its amendment, and that it cannot have any harmful effect is shown by the opinion of the attorney-general of the State upon which the comptroller made the regulation requiring withholding agents to withhold no more than the amount of the tax (see p. 51 of the Record). That opinion is set forth in appendix (p. 62). As stated under title I, above, (p. 9) the court looks to the effect rather than the phraseology of the statute, and the effect of the statute and regulations in this case is to require the withholding of no more than the amount of the tax.

IV

THE NEW YORK INCOME TAX LAW DOES NOT DENY TO ANY PERSON DUE PROCESS OF LAW.

A. As to the " Withholding Agent "

The plaintiff's contention is that since it is required to make a return of information with respect to income paid, and to withhold the tax from the compensation for personal services of non-residents, both of which requirements necessitate the disbursement of its moneys for clerk hire, otherwise unnecessary, it is thereby deprived of property without due process of law.

Accepted usages constitute due process of law. Compelling one to give information, and garnishment, are among the commonest forms of procedure customary in our courts. A subpoena, compelling a hundred-dollar-a-day man to lay aside all other business and attend to testify, bringing books and papers, at a nominal witness fee or no fee at all (as is customary in the case of defendant's witness in criminal procedure) undoubtedly deprives the witness of property — his valuable time — but no court would listen for a moment to the proposition that he was being deprived of property without due process of law. Requiring a "withholding agent" to make a return of information is much less of a hardship than requiring him to appear and give evidence in an action to enforce a tax — yet the latter would be proper and necessary were the state not permitted to compel the return of information at the source.

And withholding at the source is but a form of garnishment.

Statutes requiring both information and withholding at the source have been upheld innumerable times by the courts. We have no doubt we could discover a hundred cases where such statutes have been held constitutional in this court, where counsel raised this point or considered it not worth raising. We consider it sufficient to refer to a few cases which we have already cited:

The New York Stock Transfer Tax which requires brokers to make records of sales and to affix stamps or see that they are affixed, was upheld in *Peo. ex rel. Hatch* v. *Reardon,* 204 U. S. 152. The Pennsylvania tax on shares of bank

stock, requiring corporations to make returns of information and to deduct the tax against non-residents was upheld in *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461. The Connecticut tax making similar requirements was upheld in *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S. 364.

The Federal Income Tax Law of 1913 was attacked in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1 — all imaginable objections to its constitutionality being raised. It appears from the report of that case that counsel submitted that in many different ways the statute denied due process of law. But the court dismissed these contentions practically as if it considered them frivolous. It said (p. 21):

> "Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them. * * *. 2. The act provides for collecting the tax at the source, that is, makes it the duty of corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation,"

and at pages 24–25 continued:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause

is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat* v. *White*, 181 U. S. 264; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States*, 232 U. S. 261, 282. * * *. NONE OF THE PROPOSITIONS RELIED UPON IN THE REMOTEST DEGREE PRESENT SUCH QUESTIONS." (Capitalization ours.)

The requirements of the New York statute with respect to withholding at the source are very mild in comparison with those of the Federal act of 1913. That they may work a hardship on this plaintiff does not render the law unconstitutional — we think we have sufficiently pointed this out in Title III.

B. As to the Taxpayers.

Section 374 of the statute allows any taxpayer (and there is no distinction here between residents and non-residents) to apply to the comptroller at any time within a year from the time of filing the return, for a revision of his tax; and section 375 provides for the review by certiorari of the comptroller's determination.

This constitutes due process of law.

Michigan Central R. R. v. *Powers*, 201 U. S. 245.

Bristol v. *Washington County*, 177 U. S. 133.

Merchants' & Manufacturers' Bank v. *Pennsylvania*, 167 U. S. 461.

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232.

V

THE NEW YORK INCOME TAX LAW DOES NOT VIOLATE THE COMMERCE CLAUSE OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION.

In the recent decision of this court in *U. S. Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321, where the Wisconsin income tax was attacked as violating the Commerce Clause, and was held constitutional, a paragraph of the headnote, condensing the language of the opinion reads as follows:

> "A state in laying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Constitution."

The fact that the New York statute so taxes both residents and non-residents, does not constitute a greater interference with the exclusive congressional jurisdiction than would the taxation of residents or domestic corporations only.

In view of that decision and of the decision in *Peck & Co.* v. *Lowe,* 247 U. S. 165, we deem it unnecessary to dwell further on this point.

VI

THE NEW YORK INCOME TAX DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS IN VIOLATION OF CLAUSE 1 OF SECTION 10 OF ARTICLE I OF THE CONSTITUTION.

If the prohibition of laws impairing the obligation of contracts were to be held to prevent otherwise proper taxation, our state governments would have to go out of business. Persons make

contracts subject to the lawful demands, present or future, of the sovereigns under whose jurisdiction they make them or expect to enforce or execute them. Nobody would suggest that a contract by which a man agreed to give all his time to a certain occupation would relieve him of jury duty or militia duty, whether the statute requiring the duty were passed before or after the making of the contract. Nobody would suggest that a covenant for the quiet enjoyment of a parcel of land would forever exempt it from new taxes. Why should a contract for services at a given rate exempt the parties from taxation on their income from the product or their compensation for the performances of those services? The tax on personal service compensation is a tax against the recipient of the compensation, and its deduction at the source is no greater burden on the recipient than its collection from him direct — and no more an impairment of the obligation of the contract.

Since the decision of the *Legal Tender Cases, Knox* v. *Lee,* 12 Wall. 457, the law has been settled that:

> "as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercises of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." (p. 551.)

In the recent case of *Tanner* v. *Little,* 240 U. S. 369, this court considered a state law imposing

a prohibitive tax of $6,000 a year on every merchant distributing trading stamps and similar profit sharing coupons. The statute was attacked on the ground that it impaired the obligation of contracts between distributors and redeemers of such coupons, but the court upheld the tax, on the authority of *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S., 467, to which case as well as the many cases cited therein at page 480, we respectfully refer.

VII

THE DECREE BELOW SHOULD BE REVERSED AND THE BILL OF COMPLAINT DISMISSED.

Respectfully submitted,
CHARLES D. NEWTON,
Attorney General of New York
Solicitor for Appellant.

of Counsel,
JAMES S. Y. IVINS.

16

APPENDIX.

Opinion of Attorney-General of New York:

Excerpt from " Income Tax Letter No. 1 " to the Comptroller, May 29, 1919:

" 1. What deductions from salaries, wages, etc. should be made by ' withholding agents ' under § 366?

"As this chapter was originally drafted, it provided for a two per cent basis for the income tax, regardless of the amount of the taxpayer's total income (1919 Senate Bill Pr. No. 1427). In the last days of the legislative session the bill was amended to provide for progressive rates of taxation — one per cent on the amount of net income not exceeding ten thousand dollars; two per cent on net income between ten thousand and fifty thousand; and three per cent on net income in excess of fifty thousand dollars (§ 351). In the haste of hurried amendment the framers of the bill overlooked the provisions of § 366 and neglected to make corresponding changes, so the first subdivion of that section as enacted provides that ' every withholding agent shall deduct and withhold two per cent ' etc.— no distinction being made between the three classes of income.

" If it were not for the phraseology of other subdivisions of section 366, the first subdivision might make it unavoidably incumbent upon a withholding agent to withhold two per cent in every case, even where the tax payable to the State is only one per cent. But the phraseology of subdivisions three, four and five is such as to make the requirement that two per cent be withheld purely technical, and unenforceable

to the extent of more than one per cent in cases where the net income is ten thousand dollars or less. Subdivision one requires the withholding of two per cent of determinable annual or periodical income *taxable* under this article. Section 351 makes incomes of ten thousand dollars or less taxable at only one per cent. Subdivision 3 of § 366 requires the withholding agent to make return and pay ' the tax ' to the Comptroller. Where the tax is only one per cent, that is all that need be paid to the Comptroller. The penalty for failure to withhold is merely a liability to pay *the tax* with penalties, if it be not paid by the recipient of the income. So in case of an income of ten thousand dollars or less, the withholding agent is protected against claim by the State if he pays one per cent to the Comptroller — and there can be no object in his withholding or paying more. Further, the withholding agent is only indemnified against claims by the recipient of income to the extent of *payments made* (not amounts withheld) in accordance with the provisions of the section, and the only payments provided for are payments of *the tax*. It would follow that if more be withheld than is required to pay *the tax*, the withholding agent will be liable to the recipient of the income for the balance. And the recipient would probably enforce his claim for such balance, since he will only be credited (under subdivision 4) on making his own return with the amount of *the tax* so withheld. Also it is provided in subdivision 5 that if the recipient pay his own *tax* on the amount received, it shall not be recollected (by the Comptroller) from the withholding agent.

" I am therefore of the opinion that the Comptroller may advise withholding agents against withholding more than one per cent on incomes of ten thousand dollars or less.

[Ninety folios]

LAWS OF NEW YORK.— By Authority.

Chap. 627.

AN ACT to amend the tax law, in relation to imposing taxes upon and with respect to incomes.

Became a law May 14, 1919, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," is hereby amended by adding a new article to be article sixteen, to read as follows:

ARTICLE 16.

Taxes Upon and With Respect to Personal Incomes.

Section 350. **Definitions.** For the purpose of this article and unless otherwise required by the context:

1. The word "comptroller" means the state comptroller.

2. The word "taxpayer" includes any person, trust or estate subject to a tax imposed by this article, or whose income is in whole or in part subject to a tax imposed by this article, and does not include corporations.

3. The words "military or naval forces of the United States" include the marine corps, the coast guard, the army nurse corps, female, and the navy nurse corps, female, but this shall not be deemed to exclude other units otherwise included within such words.

4. The words "taxable year" mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this article. The words "fiscal year" mean an accounting period of twelve months, ending on the last day of any month other than December.

5. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, acting in any fiduciary capacity for any person, trust or estate.

6. The word "paid" for the purposes of the deductions and credits under this article, means "paid or accrued" or "paid or

incurred," and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed, under this article. The term "received" for the purpose of the computation of net income under this article, means "received or accrued" and the term "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

7. The word "resident" applies only to natural persons and includes for the purpose of determining liability to the tax imposed by this article upon or with reference to the income of any taxable year, commencing with the year nineteen hundred and nineteen, any person who shall, at any time on or after January first and not later than March fifteenth of the next succeeding calendar year, be or become a resident of the state.

8. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation.

9. The words "foreign country" or "foreign government" mean any jurisdiction other than one embraced within the United States. The words "United States" include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words "withholding agent" include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

§ 351. **Imposition of income tax.** A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per

centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen.

§ 352. **Exemption of certain personal property from taxation.** The taxes imposed by this article are in addition to all other taxes imposed by law, except that money on hand, on deposit or at interest, bonds, notes and choses in action and shares of stock in corporations other than banks and banking associations, owned by any individual or constituting a part of a trust or estate subject to the income tax imposed by this article, and from which any income is derived, shall not after July thirty-first, nineteen hundred and nineteen, be included in the valuation of the personal property included in the assessment-rolls of the several tax districts, villages, school districts and special tax districts of the state.

§ 353. **Ascertainment of gain and loss.** For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be first, in case of property acquired before January first, nineteen hundred and nineteen, the fair market price or value of such property, as of January first, nineteen hundred and nineteen, and, second, in case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with this article.

§ 354. **Exchange of property.** When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger or consolidation of a corporation a taxpayer receives, in place of stock or securities owned by him, new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securi-

ties received shall be treated as taking the place of the stock, securities or property exchanged.

§ 355. **Gain through exchange.** When in the case of any such reorganization, merger or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost of the stock or securities exchanged, if acquired on or after January first, nineteen hundred and nineteen, and its fair market price or value as of January first, nineteen hundred and nineteen, if acquired before that date.

§ 356. **Inventory.** Whenever in the opinion of the comptroller the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the comptroller may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income, and conforming so far as may be to the forms and methods prescribed by the United States commissioner of internal revenue under the act of congress known as the revenue act of nineteen hundred and eighteen.

§ 357. **Net income defined.** The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

§ 358. **Computation of net income.** 1. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the comptroller does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in this article, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

2. If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the comptroller, be computed on the basis of such new accounting period, subject to the provisions of section three hundred and seventy.

§ 359. **Gross income defined.** The term "gross income":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

2. Does not include the following items which shall be exempt from taxation under this article:

a. The proceeds of life insurance policies and contracts paid upon the death of the insured to individual beneficiaries or to the estate of the insured.

b. The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract.

c. The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

d. Interest upon the obligations of the United States or its possessions; or securities issued under the provisions of the federal farm loan act of July seventeen, nineteen hundred and sixteen; or bonds issued by the war finance corporation; or the obligations of the state of New York or of any municipal corporation or political subdivision thereof; or investments upon which the tax provided for in section three hundred and thirty-one of this chapter has heretofore been paid since June first, nineteen hun-

dred and seventeen, during the period of years for which such tax shall have been paid.

e. Any amount received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

f. Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States.

g. Income received by any officer of a religious denomination or by any institution, or trust, for moral or mental improvement, religious, bible, tract, charitable, benevolent, fraternal, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more of such purposes, if such income be used exclusively for carrying out one or more of such purposes; but nothing herein shall be construed to exempt the fees, stipends, personal earnings or other private income of such officer or trustee.

3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article.

§ 360. **Deductions.** In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. In the case of a resident of the state such a proportion of the total interest paid or accrued during the taxable year on in-

debtedness, as the net income of the taxpayer taxable under this article bears to his total income from all sources; or in case of an individual not a resident of the state, the same proportion of interest paid or accrued within the taxable year on indebtedness which the amount of such gross income, as herein defined, bears to the gross amount of his income from all sources within and without the state.

3. Taxes other than income taxes paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, or, third, by the authority of any foreign government.

4. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

5. Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions within the state.

6. Losses sustained during the taxable year of property not connected with the trade or business (but, in the case of a taxpayer other than a resident, only of property within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

7. Debts ascertained to be worthless and charged off within the taxable year.

8. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

9. In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted; provided, that in the case of such properties acquired prior to January first, nineteen hundred and nineteen, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date; provided, further, that in the case of mines, oil and gas

wells, discovered by the taxpayer on or after January first, nineteen hundred and nineteen, and not acquired as the result of a purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery or within thirty days thereafter; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the comptroller. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee.

10. Contributions or gifts made within the taxable year to corporations incorporated by, or associations organized under, the laws of this state and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by section seven of the act of congress known as the vocational rehabilitation act, to an amount not in excess of fifteen per centum of the taxpayer's net income as computed without the benefit of this subdivision. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the comptroller. In the case of a taxpayer other than a resident of the state this deduction shall be allowed only as to contributions or gifts made to corporations or associations incorporated by or organized under the laws of this state or to the vocational rehabilitation fund above mentioned.

11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the comptroller.

§ 361. **Items not deductible.** In computing net income no deduction shall in any case be allowed in respect of:

1. Personal, living, or family expenses;

2. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

3. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

4. Premiums paid on any life insurance policy, covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

§ 362. **Exemptions.** The following exemptions shall be allowed to any resident taxpayer:

1. In the case of a single person, a personal exemption of one thousand dollars, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of two thousand dollars. A husband and wife living together shall receive but one personal exemption of two thousand dollars against their aggregate net income; and in case they make separate returns, the personal exemption of two thousand dollars may be taken by either or divided between them.

2. Two hundred dollars for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

3. A taxpayer receiving salary, wages, or other compensation from the United States as an official thereof, exempt from taxation under this article, shall be entitled to only so much of the personal exemption provided for in this section as is in excess of the aggregate amount of such salaries, wages, or other compensation.

§ 363. **Credit for taxes in case of taxpayers other than residents of the state.** Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed

only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws.

§ 364. **Partnerships.** Individuals carrying on business in partnerships shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed. Taxpayers who are members of partnerships may be required by the comptroller to make a return stating the gross receipts and net gains or profits of the partnership for any taxable year. The net income of the partnership shall be computed in the same manner and on the same basis as provided in computing the net income of individuals except that the deduction provided in subdivision ten of section three hundred and sixty shall not be allowed and the personal exemptions provided for in section three hundred and sixty-two shall be allowed only to the individual partners.

§ 365. **Estates and trusts.** 1. The tax imposed by this article shall apply to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust; and

d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual tax-

payers, except that there shall also be allowed as a deduction any part of the gross income which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph d of subdivision one of this section, the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under section three hundred and fifty-nine, subdivision three.

4. In cases under paragraph d of subdivision one of this section and in the case of any income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such

cases the income of a beneficiary of such estate or trust not a resident shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents.

§ 366. **Information and payment at source.** 1. Every withholding agent shall deduct and withhold two per centum from all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed and determinable annual or periodical compensation of whatever kind and in whatever form paid or received, earned for personal services and taxable under this article, of which he shall have control, receipt, custody, disposal or payment, if the amount paid or received or to be paid or received in any taxable year on account of any individual equals or exceeds one thousand dollars, unless there shall be filed with the withholding agent, before the time when he is required to make return and payment thereof, a certificate in such form as shall be prescribed by the comptroller to the effect that the person entitled to such salary, wage, commission, gratuity, emolument, perquisite or other compensation is a resident and setting forth his residence address within the state.

2. Every withholding agent shall make return to the comptroller of complete information concerning the amount of all interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits and income, except interest coupons payable to bearer, of any taxpayer taxable under this article of one thousand dollars or more in any taxable year under such regulations and in such form and manner and to such extent as may be prescribed by the comptroller.

3. Every withholding agent required to deduct and withhold any tax under subdivision one of this section shall make return thereof on or before the fifteenth day of March in each year and shall at the same time pay the tax to the comptroller. Every such individual corporation or partnership is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this section.

4. Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

5. If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

§ 367. **Taxpayers' returns.** Every taxpayer having a net income for the taxable year of one thousand dollars or over if single or if married and not living with husband or wife, or of two thousand dollars or over if married and living with husband or wife, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed by this article. If a husband and wife living together have an aggregate net income of two thousand dollars or over, each shall make such a return unless the income of each is included in a single joint return. If the taxpayer is unable to make his own return the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. A taxpayer other than a resident shall not be entitled to the deductions authorized by section three hundred and sixty unless he shall make under oath a complete return of his gross income both within and without the state.

§ 368. **Partnership returns.** Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

§ 369. **Fiduciary returns.** Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the taxpayer for whom he acts, first, if the net income of such taxpayer is one thousand dollars or over if single, or if married and not living with husband or wife, or two thousand dollars or over if married and living with husband or wife, or second, if the net income of such taxpayer, if an estate or trust, is one thousand dollars or over or if any beneficiary is a taxpayer other than a resident of the state, which return shall state specifically

the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the comptroller may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the comptroller or collector in the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

§ 370. **Returns when accounting period changed.** If a taxpayer, with the approval of the comptroller, changes the basis of computing net income from fiscal year to calendar year, a separate return shall be made for the period between the close of the last fiscal year for which return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is made from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the last fiscal year. If the change is from one fiscal year to another fiscal year, a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year, he shall make a separate return for the period between the beginning of a calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the exemptions allowed in this article shall be reduced respectively to amounts which bear the same ratio to the full exemptions provided for as the number of months in such period bears to twelve months.

§ 371. **Time and place of filing returns.** Returns shall be made to the comptroller on or before the fifteenth day of March in each year of the taxpayer's net income for his last preceding

taxable year. The comptroller may grant a reasonable extension of time for filing returns whenever in its judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be granted for more than six months. Such returns shall, so far as may be, set forth the same or similar items called for in the blank forms of return prescribed by the United States commissioner of internal revenue for the enforcement of the act of congress known as the revenue act of nineteen hundred and eighteen, together with such other facts as the comptroller may deem necessary for the proper enforcement of this article. There shall be annexed to such return the affidavit or affirmation of the person making the return, to the effect that the statements contained therein are true. Blank forms of return shall be furnished by the comptroller upon application, but failure to secure the form shall not relieve any taxpayer from the obligation of making any return herein required.

§ 372. **Administration of income tax law.** The comptroller shall administer and enforce the tax herein imposed for which purpose he may divide the state into districts in each of which a branch office of the comptroller may be maintained; provided that in no cases shall a county be divided in forming a district.

§ 373. **Powers of comptroller.** If in the opinion of the comptroller any return of a taxpayer is in any essential respect incorrect he shall have power to revise such return, or if any taxpayer fails to make return as herein required, the comptroller is authorized to make an estimate of the taxable income of such taxpayer from any information in his possession, and to audit and state an account according to such revised return or the estimate so made by him for the taxes, penalties and interest due the state from such taxpayer. The comptroller shall also have power to examine or cause to have examined, in case of failure to report the books and records of any such taxpayer, and may take testimony and require proof material for his information.

§ 374. **Revision and readjustment of accounts by comptroller.** If an application for revision be filed with the comptroller by a taxpayer within one year from the time of the filing of the return, or if the tax of such taxpayer shall have been recomputed, then from the time of such recomputation, the comptroller shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to him or otherwise, that any such

computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the comptroller shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of his determination thereon to the taxpayer.

§ 375. **Review of determination of comptroller by certiorari and regulations as to writ.** The determination of the comptroller upon any application made to him by any taxpayer for revision and resettlement of any computation of tax, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any statement of a computation or any determination by the comptroller under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the comptroller of the application for such writ. Before making the application an undertaking must be filed with him, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the comptroller affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including costs of all appeals.

§ 376. **Penalties.** 1. Any person required by this article to make, render, sign or verify any return, who fails to make, render, sign or verify such return within the time required by or under a provision of law, or who makes any false or fraudulent return or statement, with intent to evade any tax imposed by this article, shall be guilty of a misdemeanor and shall, upon conviction, be fined not to exceed one thousand dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court.

2. If any such person shall fail or refuse to make a return of income at the time or times hereinbefore specified, but shall voluntarily make a correct return of income within sixty days thereafter, there shall be added to his tax five per centum of the amount otherwise due, but such additional amount shall in no case be less than two dollars.

3. If any person liable to taxation under this article fails to make a return as herein required, the amount of income of such

person discovered to be taxable shall be subject to twice the ordinary rate of taxation. If any person liable to taxation under this article makes any false or fraudulent return or statement, with intent to evade any tax imposed by this article, and an additional amount is discovered to be taxable, such additional amount shall be subject to twice the ordinary rate of taxation. Such tax shall be collected at such time and in such manner as may be designated by the comptroller. This penalty shall be additional to all other penalties in this or any other section provided.

§ 377. **When payable.** 1. Each taxpayer shall, at the time of filing his return, pay to the comptroller the amount of tax payable hereunder as the same shall appear from the face of the return. If the time for filing the return shall be extended, he shall pay in addition interest thereon at the rate of six per centum per annum from the time when the return was originally required to be filed to the time of payment.

2. As soon as practicable after the return is filed, the comptroller shall examine it and compute the tax.

3. If the amount of tax as computed shall be greater than the amount theretofore paid, the excess shall be paid by the taxpayer to the comptroller within thirty days after the amount of the tax as computed shall be mailed by the comptroller.

4. If the amount of tax as computed shall be less than the amount theretofore paid, the excess shall be refunded by the comptroller out of the proceeds of the tax retained by him as provided in this article.

§ 378. **Notice of assessment.** Notice of tax assessment shall be sent by mail to the post office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be preserved by the comptroller.

§ 379. **Collection of taxes; penalties and interest.** 1. The comptroller is authorized at his discretion to designate agents for the purpose of collecting income taxes and shall require from them reasonable bond.

2. If the tax imposed by this article or any part of such tax be not paid at the time when required to be paid under the provisions of this article or in the case of additional taxes, at the time designated by the comptroller, the taxpayer liable to pay such tax shall pay to the comptroller, in addition to the

amount of such tax, or part thereof, five per centum of said amount, plus one per centum for each month, or fraction of a month, the tax, or part thereof, remains unpaid.

§ 380. **Warrant for the collection of taxes.** If any tax imposed by this article or any portion of such tax be not paid within sixty days after the same becomes due, the comptroller shall issue a warrant under his hand and official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property or chattels real of the person against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect income taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the comptroller shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax.

§ 381. **Action for recovery of taxes.** Action may be brought at any time by the attorney-general of the state at the instance of the comptroller, in the name of the state to recover the amount of any taxes, penalties and interest due under this article.

§ 382. **Distribution of the income tax.** Of the revenue collected under this article the comptroller shall retain in his hands sufficient to provide at all times a fund in his hands in the sum of two hundred and fifty thousand dollars out of which he shall pay any refunds to which taxpayers shall be entitled under the provisions of this article. Of the remainder, fifty per centum shall be paid into the state treasury to the credit of the general fund. The remaining fifty per centum thereof shall, not later than the first day of July, and in case of moneys subsequently collected at least quarterly thereafter, be distributed and paid to the treasurers of the several counties of the state, in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. As to any county included in the city of New York such payment shall be made to the receiver of taxes in such city and be paid into the general fund for the reduction of taxation of the city of New York. The county treasurer shall apportion the amount so received among the several towns and cities within the county in proportion that the assessed valuation of the real property of each town or city bears to the aggregate assessed valuation of the real property of the county, and shall credit the amount apportioned to each town against the county tax payable by it, and shall pay the amount apportioned to each city to the chief fiscal officer of the city to be paid into the general fund for city purposes. If the amount of the credit to a town exceeds the county tax from such town, the excess shall be paid to the supervisor of the town and be by him credited to general town purposes.

§ 383. **Comptroller to make regulations and to collect facts.** The comptroller is hereby authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article.

§ 384. **Secrecy required of official; penalty for violation.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller, any

agent, clerk, or other officer or employee to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney-general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of sections three hundred and eighty and three hundred and eighty-one of this chapter. Reports and returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the state he shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

§ 385. **Contract to assume income tax illegal.** It shall be unlawful for any person to agree or contract directly or indirectly to pay or assume or bear the burden of any tax payable by any taxpayer under the provisions of this article. Any such contract or agreement shall be null and void and shall not be enforced or given effect by any court.

§ 2. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 3. An assessment on account of personal property made prior to August first, nineteen hundred and nineteen, shall be as valid and effectual as if this act had not been passed, and nothing in this act shall be construed to impair the obligation to pay taxes assessed on account of personal property in the year nineteen hundred and eighteen or the year nineteen hundred and nineteen prior to August first whether payable in that year or not.

§ 4. If in any city entitled to receive a portion of the taxes collected under article sixteen of the tax law as added by this act the budget for the fiscal year current on July first, nineteen hundred and twenty, shall be completed prior to that date, the board of estimate and apportionment or other board or body having the duty of preparing the budget in such city shall have the power subsequent to such date and before the levy of the taxes on account of the appropriations made by such budget to revise the estimates of city revenue so as to include in such calculation the income to the city from taxes collected under article sixteen of the tax law as added by this act.

§ 5. The sum of three hundred thousand dollars ($300,000), or so much thereof as may be needed, is hereby appropriated out of any money in the treasury, not otherwise appropriated, for the administration of article sixteen of the tax law as added by this act, but any position established or salary fixed for such purpose shall be deemed temporary only and subject to the future action of the legislature but no new position shall be created nor salary fixed except on the unanimous approval of the governor, the chairman of the senate finance committee and the chairman of the assembly ways and means committee.

§ 6. Except as otherwise provided herein this act shall take effect immediately.

State of New York, } ss:
Office of the Secretary of State }

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

FRANCIS M. HUGO
Secretary of State

No. 548

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1919

EUGENE M. TRAVIS, as Comptroller of the State of New York

Appellant

against

THE YALE & TOWNE MANUFACTURING COMPANY

Appellee

BRIEF FOR APPELLEE

Louis H. Porter
Archibald Cox
Counsel for Appellee

Appeal Printing Company, New York City.

SUBJECT INDEX.

Alphabetical List of Cases.

Text Books Cited.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 548.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Appellant, *against* THE YALE & TOWNE MANUFACTURING COMPANY, Appellee.	

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEE'S BRIEF.

This appeal presents questions as to the constitutionality of portions of Chapter 627 of the Laws of 1919 of the State of New York, which added to the tax laws of the State a new article entitled "Taxes Upon and With Respect to Personal Incomes" (Rec., p. 26).

The statute imposes a tax upon every resident of the State "upon and with respect to his entire net income as herein defined" and "a like tax * * * upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this State by natural persons not residents of the State" (Sec. 351, Rec., p. 28).

Under this statute, "it is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology" (Appellant's Brief, p. 10), in so far as the essential nature of the tax is concerned. This suit questions only the constitutionality of portions of the statute imposing the tax on non-residents.

Furthermore, this suit does not involve a determination of the validity of the tax on such income of non-residents as is derived from property within the State.

The sole question here is as to the power to impose a tax on income derived by a non-resident from his personal services or exertions performed within the State. The question is further narrowed in the instant case by the fact that such income comes from salary paid by another non-resident.

The Essential Character of the Provisions of the Statute Questioned.

The attempt to impose such a tax upon non-residents necessarily presents certain difficulties which this statute seeks to meet in ways which reveal the unconstitutionality of the enactment. As matter of settled law, as well as practical experience, a State can successfully reach only those persons and things which are within its territorial boundaries with such degree of permanence as confers jurisdiction. Where it is sought to exercise jurisdiction over the person by the imposition of personal liability for a tax, the presence of the person within the State, with some such degree of permanence as is implied in the term "resident," is necessary, because otherwise the State cannot enforce the personal liability either practically or legally. Similarly, the net income (regarded as a piece of property, if that is possible) is never within the territorial jurisdiction of the State, in the case of many non-residents. In the present instance, for example, many of appellee's employees receive even their gross salaries outside the State of New York (Rec., p. 3c); and, as a practical matter, that could, of course, be readily arranged in all cases.

Apparently recognizing these difficulties this statute attempts to deal with the non-resident by imposing a personal liability upon someone else within the State who has control of payment to the non-resident of sums entering into the computation of the net income. Such a person is designated a "withholding agent" and made personally liable unless the non-resident pay the

tax (Sec. 366, Rec., p. 36). In other words, the State being unable to reach the non-resident or his net income (because in many cases both are outside its jurisdiction), seeks to accomplish the result by imposing personal liability for the payment of a sum in excess of the tax upon another whom the State can reach, in this instance, the non-resident's employer, a Connecticut corporation doing business also in New York and owning property there (Rec., p. 2b).

It is to be observed in passing (with reference to the Attorney General's argument as to power in fact) that this same method would enable the State of New York to tax appellee's employes in Connecticut, who never come within the State of New York, on their entire net income or Connecticut real estate, so far as power in fact is concerned.

This method of seeking to reach the non-resident's net income in fact requires this appellee to expend more than a thousand dollars a year to collect for the State of New York little more than three thousand dollars a year in taxes measured by the net incomes of its non-resident employees who have performed some services in New York (Rec., p. 3c., 7).

SUMMARY OF POINTS.

I. The action of the State of New York in requiring a Connecticut corporation thus to withhold portions of its payments to its Connecticut employees in Connecticut, is respectfully questioned, on the authority of the decision of this Court in *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania*, 153 U. S., 628.

The questions of more general importance are these:

II. The portions of the statute relating to the taxation of non-residents are inconsistent with the "due process of law" clause of the Fourteenth Amendment, because they seek to tax persons or property beyond the jurisdiction of the State; and

III. Since those provisions discriminate against those who are citizens of other States, and to the extent that they so discriminate, they are inconsistent with the "privileges and immunities" clauses of Article IV and the Fourteenth Amendment, as well as denying to non-residents the equal protection of the laws.

The Court below proceeded upon the ground that since the statute plainly operates to discriminate against citizens of other States, it was unnecessary to consider the other questions. We refer first to the right of this appellee to maintain this bill in equity, and then to the three principal questions concerning the constitutionality of this tax.

ARGUMENT.

The Bill in Equity was Properly Filed by Appellee as Complainant.

In the case at bar, a statute of the State of New York makes a Connecticut corporation personally liable for a certain percentage of each salary paid by it to Connecticut citizens and residents who have done any work for it in New York, unless the non-resident shows under oath, and pays to the State of New York a percentage of something else, to wit, his "net income as herein defined" (Secs. 366, 367, Rec. pp. 36, 37).

The appellee is, accordingly, placed in this position: Being a citizen of Connecticut, with its factory and principal place of business in Connecticut, and employing sundry persons, including citizens and residents of Connecticut, to whom it had contracted to pay definite salaries for their services, various fractions of which are performed in the State of New York, it is directed by the statute to deduct and withhold a percentage of such gross salaries of such employees. If it does so, such employees can, of course, sue it for breach of contract, and the suit would be between citizens of Connecticut, in the Connecticut courts. If it refuses to withhold, it subjects itself to personal liability for that percentage of the gross salary and judgments and penalties under the statute (Secs. 366, 373, 376, 379, 380, 381, Rec., pp. 36, 39, 41, 42.) Accordingly, this suit in equity is its proper recourse.

Cummings v. *National Bank*, 101 U. S., 153;

Pelton v. *National Bank*, 101 U. S., 143;

Hills v. *Exchange Bank*, 105 U. S., 319;

Johnson v. *Wells Fargo & Co.*, 239 U. S., 234;

Green v. *Louisville & Interurban R. R. Co.*, 244 U. S., 499.

POINT I.

The provisions of the statute which require a Connecticut corporation to withhold and pay to the State of New York a portion of the gross salaries it has agreed to pay to its non-resident employees in Connecticut are unconstitutional.

The appellee's factory and principal place of business is at Stamford, Connecticut. It is authorized to do business in New York and owns property there, but it is a citizen and resident of Connecticut; and the statute, of course, applies equally to an individual in its position. It employs sundry persons, including citizens and residents of Connecticut and New Jersey, to work for it, and has contracted to pay them definite salaries for their services. These salaries are paid in different ways, in some instances by checks mailed from the office in Connecticut to the employees outside the State of New York, if that is material (R., pp. 2b, 3c). And they are in accordance with contracts of employment entered into before the enactment of the law (*ib.*). The statute seeks to impose on the appellee a personal liability as the means of compelling it to obey.

The invalidity of such provisions seems to be directly established by *New York, Lake Erie & Western Railroad* v. *Pennsylvania* (*supra*), (153 U. S., 628). In that case, Pennsylvania attempted to impose upon a New York corporation authorized to run its railroad through the State of Pennsylvania, the duty of deducting from the interest due on evidences the indebtedness held by residents of Pennsylvania the amount assessed

upon bonds and moneyed capital in the hands of such residents of Pennsylvania. In that case, the payees were within the jurisdiction of Pennsylvania. Here, there seems to be not even that much connection with the jurisdiction of the State seeking to have the foreign corporation withhold its extra-state payments. In that case the Court said:

> "If Pennsylvania, in order to collect taxes assessed upon bonds issued by its own corporations and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known at the time by the corporation paying the interest to be residents of that State—and it may be admitted, in this case, that the State, if not restrained by a valid contract to which it was a party, could establish such a regulation—it does not follow that the State may impose upon foreign corporations, because of their doing business in that State with its permission given for a valuable consideration, any duty in respect to the mode in which they shall perform their obligations in other states.
>
> "The New York, Lake Erie & Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another state shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, di-

> rectly or indirectly, interpose between the corporation and its creditor, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction" (p. 646).

A corporation or individual, by securing authority to transact business within a State, does not thereby bring within the jurisdiction of that State its transactions and properties wholly without the State. It is not a matter of convenient collection, but a matter of jurisdiction.

In *Hatch* v. *Reardon,* 204 U. S., 152; *Merchants' and Manufacturers' Bank* v. *Pennsylvania,* 167 U. S., 461; *Travelers' Insurance Co.* v. *Connecticut,* 185 U. S., 364; *Brushaber* v. *Union Pacific,* 240 U. S., 1; *Citizens' National Bank* v. *Kentucky,* 217 U. S., 443, the jurisdiction over the person or transaction was plain. But here we have an effort to control payments made outside the State, under contracts made outside the State, by a corporation, a citizen of another State, to citizens and residents of other States. Such control of persons and things beyond the jurisdiction of the State, sought to be accomplished by imposing a personal liability upon the corporation coming within the State only for other purposes, seems plainly to conflict with the rule illustrated and sanctioned by *New York, Lake Erie & Western Railroad* v. *Pennsylvania* (supra).

POINT II.

The provisions of the statute relating to the taxation of non-residents are inconsistent with the "due process of law" clause of the Fourteenth Amendment, because they tax persons or things outside the jurisdiction of the State of New York and within the jurisdiction of other States.

That taxation by a State of persons or property outside its jurisdiction and within the jurisdiction of another State constitutes a taking of property without due process of law is "firmly established" (216 U. S. 1) "has been repeatedly held by this Court" (199 U. S. 194). "No principle is better settled" (153 U. S. 628).

> *Cleveland, etc., Co.* v. *Pennsylvania* (*State Tax on Foreign held Bonds*), 15 Wall., 300;
> *New York, Lake Erie and Western* v. *Pennsylvania*, 153 U. S., 628 (*supra*);
> *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S., 194;
> *Western Union* v. *Kansas*, 216 U. S., 1;
> *Delaware, Lackawanna, etc., Co.* v. *Pennsylvania*, 198 U. S., 341;
> *Dewey* v. *Des Moines*, 173 U. S., 193.

To determine the constitutionality of this tax, it is accordingly necessary to ascertain, not colloquially, but from a jurisdictional standpoint what is taxed, and whether that is within the jurisdiction of the State of New York.

The applicable definitions of the law are:

"Sec. 357. The term 'net income' means

the gross income of a taxpayer less the deductions allowed by this article. * * * (Rec., p. 29).

"Sec. 359. * * * The term 'gross income': includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever . * * * (Rec., p. 30).

"In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article" (Rec., p. 31).

Under the provisions of these sections, the Comptroller of the State has properly ruled that in the case of employees of the plaintiff corporation who are engaged any part of their working time in services within New York, a tax accrues measured by the proportionate amount of their income derived from such personal service. The exemption of those having earnings of less than one thousand dollars obviously does not affect the jurisdictional question. The question is, what is here the subject upon which the tax is imposed.

In *State Tax on Foreign Held Bonds*, 15 Wall, 300, this court defined the possible subjects of taxation:

> "These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways" (p. 519).

Many so-called business taxes are license taxes charged as a condition for permission to do something which the taxing power can prohibit. The exaction of such a license tax is strictly an exertion of the police power, whose jurisdiction is wholly different from that of taxation. This distinction is well recognized and is summarized in *Cyc*,

> "Power to license, which, strictly speaking, is simply a power to sell a privilege, may be maintained when a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to or involves danger to the public, * * *" (Vol. 25, p. 598).
>
> "While in a broad sense a license fee may be regarded as a tax, there is properly speaking and as generally understood a clear distinction between licensing and taxation, and between license fees and ordinary taxes. License fees exacted for the primary purpose of regulating or restraining occupations deemed dangerous to the public or to be specially in need of public control are imposed in the exercise of the police power, and not that of taxation; and where the object of the imposition is not to raise revenue, the fact that

> the fee demanded is greater than the expense of issuing the license, and therefore does in fact produce revenue, is not sufficient to make it a tax. If, however, the fee or charge is imposed solely or primarily as a means of raising revenue, it is a tax, regardless of the name by which it may be called." (Vol. 37, p. 711).

Confining the classification to true taxes, levied and collected as an attribute of sovereignty under the tax power, and from the jurisdictional standpoint, the definition of taxable subjects quoted above may properly be further limited to persons and property. This classification was adopted by this Court in

St. Louis v. *Ferry Co.*, 11 Wall, 423, 430,

where Judge Swayne said:

> "*Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void.* If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation as to valid judicial action." (Italics ours.)

Put in other words, the possible subjects of taxation divide themselves, for purposes of jurisdiction, into (1) those which are levied on property, where the property itself is subject to the tax, the State taking a portion of the property within its jurisdiction without regard to the owner, except

in so far as it permits the owner to pay and release the property; and (2) those which are levied on persons, which impose a personal liability which the individual is required to pay, and which is measured in one of a great many ways, as, for instance, the poll tax, the economic condition of the individual taxed, his occupation, etc.

Coosa Principles of Taxation, pp. 67, 145.

License taxes levied under the police power rest upon the right to regulate and prohibit and involve altogether different legal considerations from taxes imposed in any form under the tax power as a revenue measure.

But taxes for revenue imposed in the form of licenses are not thereby freed from the constitutional limitations on the taxing power, one of which is the requirement that a valid tax must be predicated upon jurisdiction over the person or over the property taxed. Thus in

Welton v. *Missouri*, 91 U. S., 275, 278, the Court said:

> "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

(1) The tax here in question is a subjective tax imposing personal liability upon the person receiving and enjoying the "net income" which merely measures the burden imposed on the taxpayer in personam.

This proposition seems plain from the following:

(a) There is no room for any suggestion that the tax on residents is anything but a tax on the person; and, as said by the Attorney-General,

> "it is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology" (Appellant's Brief, p. 10).

The difference in phraseology imposing a tax "upon every resident * * * upon and with respect to his entire net income as herein defined" and " a like tax * * * upon and with respect to the entire net income as herein defined * * * from all property owned and from every business, trade, profession or occupation carried on in this State by natural persons not residents" is plainly not a change in substance. The statute defines "taxpayer" as "any person, trust or estate subject to a tax imposed by this article or whose income is in whole or in part subject to a tax imposed by this article" (Sec. 350, Rec., p. 27), and proceeds to speak of "the taxpayer" throughout—"in the case of taxpayers other than residents" (Sec. 359, par. 3, Rec., p. 31; Sec. 360, par. 11, Rec., p. 33; Sec. 367, Rec., p. 37).

In *Brady* v. *Anderson*, 240 Fed., 665, the Circuit Court of Appeals for the Second Circuit was called upon to consider whether the Federal Income Tax

Act of October 3, 1913, was a tax upon the person or a tax upon property. The Court said:

> "In our opinion, the tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. *The statement that the tax is upon this income does not create an obligation in rem. It is only a way of saying that the owner is taxable with reference to the income.*" (p. 667). (Italics ours.)

The Wisconsin Court, in dealing with the income tax in *State, ex. rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commissioner,* 163 N. W., 639, 166 Wis., 287, said:

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed, not his property * * *. But the tax is upon the right or ability to produce, create, receive and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income, irrespective of the amount of specific property or ability necessary to produce or create it. In the ordinary acceptation of the term, this may be said to be a tax upon the income as the statute denominates it. But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon the recipient of an income."

and in the *Income Tax Cases,* 148 Wis., 456, the Wisconsin Court reiterated this classification, saying:

> "By this act the legislature has in substance, declared that the State's system of taxation

shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly according to value" (p. 506).

(b) The term "net income," according to this statute (Sec. 357, Rec., p. 29) means the "gross income of a taxpayer" (as defined in the statute, Sec. 359, Rec., p. 30), less certain deductions (also defined in the statute, Sec. 360, Rec., p. 31), computed as defined (Sec. 358, Rec., p. 29). The "net income" taxed under this statute is thus a balance reached by computation at the end of an annual accounting period during which receipts, expenses and losses are experienced (Sec. 358, Rec., p 29). The returns showing the computation and the taxpayer's net income for his last preceding taxable year are filed on or before the 15th day of March, in the following year (Sec. 371, Rec., p. 38), and the tax on such net income is then due and payable (Sec. 377, Rec., p. 40).

Thus, before anything taxable comes into existance or the amount of the tax can be determined, the receipts during the year must have come in and the deductions during the year must have been expended and determined, because the tax is not measured by the gross salary or amount that is received.

The liability is measured with reference to the net balance. And that net from the year's experience, is used only as a sufficient measure of the general financial condition of the individual and his personal liability to pay from any resources he can control.

(c) Even the amount of the tax varies according to the person of the recipient, and is not based upon the property or amount thereof. Thus, if the amount of income is twenty thousand dollars, it is taxed at one rate when received by one person, at another rate when received by two persons, and it is free from tax when received by twenty persons.

(d) This tax is not even measured strictly by the amount of income which a person receives. It is measured with a view to securing equality of sacrifice among taxpayers. It is not levied at a uniform rate according to the amount of income a man receives, but progressively upon the theoretical extent of the sacrifice which the individual should make for the welfare of the State—one per cent. up to ten thousand dollars, then two per cent., then three per cent. (See *State* v. *Frear*, 148 Wis., 456.)

The tax is thus plainly on the individual person and calls on him to contribute from his resources in general an amount based on his ability to contribute as measured by his individual experience during the past year.

(e) And that the tax is personal is confirmed by the provisions for its collection, none of which sound *in rem* and all of which impose personal liability. The provisions requiring employers to withhold and pay simply impose upon one who can be reached a personal liability to secure the performance of the personal liability of the non-resident beyond the jurisdiction (Sec. 366, Rec., p. 36). There is no lien upon any property for the payment of the tax, but the provisions for

compelling payment look solely to personal liability. The failure to make the return is a criminal offense (Sec. 376, Rec., p. 39). The failure to pay the tax subjects the person to penalties (Sec. 379, Rec., pp. 40, 41). The Attorney General is directed to bring suit to recover the amount of the tax and penalties and a personal judgment may be entered. (Sec. 381, Rec., pp. 41, 42). The comptroller can issue an execution to the sheriff, who can levy upon all property belonging to the person, regardless of whether the property was in any way connected with the production of the income by which the tax is measured (Sec. 380, Rec., p. 41). The liability is thus purely personal and the tax is a tax imposed upon the individual.

That a tax with respect to "net incomes" is a personal tax, from the point of view of jurisdiction similar to a poll tax, is well indicated by the language of the Supreme Court of Massachusetts in *Maguire* v. *Tax Commissioner*, 120 N. E., 162, 230 Mass. 503, where it is said:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty, and the other privileges of

dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it protects him from unjust interference * * *" (pp. 512, 513).

(f) Individual income as such dissociated from the person of the owner, has no existence and is a purely fanciful conception. An income of ten thousand dollars aside from the person who receives that income is a pure abstraction. A house worth $10,000, or goods in trade of the value of $10,000, or $10,000 of corporate bonds all have real property existence entirely irrespective of the person to whom that property belongs. Tangible property has a situs where it is located. As to many kind of intangible property the courts have found an actual, taxable situs of the property irrespective of the domicile of the owner. But an individuals taxable income can have no real existence apart from the person to whom it is a mere attribute.

(2) Since this statute thus imposes a personal tax on a non-resident of the State, it is unconstitutional.

A statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is a taking of property without due process of law.

In *U. S.* v. *Erie Ry. Co.*, 106 U. S. 327, the question was as to the validity of the Civil War tax of 5% of the amount of interest paid by resident corporations to non-resident bondholders. The case was tried in the District Court, and was first heard on appeal by Chief Justice Waite sitting in the Circuit Court. Fed. Case No. 15056. The tax was there considered an income tax against the non-resident bondholder, and was held void, the Chief Justice saying:

> "The tax for which the suit was brought, was the tax upon the owner of the bond, and not upon the defendant. It was not a tax in the nature of a tax *in rem* upon the bond itself, but upon the income of the owner of the bond, derived from that particular piece of property. The foreign owner of these bonds was not in any respect subject to the jurisdiction of the United States, neither was this portion of his income. His debtor was, and so was the money of his debtor; but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment was outside of the United States, in accordance with the obligations of the contract which he held. The power of the United tates to tax is limited to persons, property, and business within their jurisdiction, as much as that of a State is limited to the same subjects within its jurisdiction."

When the case reached this Court, *Railroad Co.* v. *Collector,* 100 U. S., 595, had been decided, holding that this tax was not against the holder of the bonds, but an excise tax against the corporation paying the interest. In the Erie case, therefore, in a brief opinion the Chief Justice reversed his own decision at Circuit, solely upon the ground of the nature of the particular tax in question. Justice Field's dissenting opinion indicates that viewed as a tax either upon the property or the person of the non-resident recipient of the interest, the tax would have been held invalid.

In *Dewey* v. *Des Moines* (*supra*) this Court set aside as contrary to the Fourteenth Amendment a personal liability to pay a tax sought to be enforced against a non-resident because of land owned by him within the borders of the taxing state. Jurisdiction to tax the property *in rem* was held not to give jurisdiction to tax the owner *in personam.*

City of New York v. *McLean,* 170 N. Y., 374, followed and interpreted the Des Moines case, holding that a personal liability could not be asserted against a non-resident taxpayer. The Court said:

> "The Board of Taxes and Assessments in making the assessment which is sought to be enforced by this action acted judicially. Hence the important question presented is whether it had such jurisdiction of the person of the defendant as authorized it to make a personal assessment against him. That it had jurisdiction to assess the shares of stock belonging to him, and which stood in his name, is not denied. Did it have such jurisdiction of his person as authorized it to make an as-

> sessment which could be enforced against him personally? We think not. No sovereignty can subject either property not within its territorial limits, or the person of one not within its boundaries to its judicial decisions. Every exercise of authority of this kind would be beyond the power of the State to grant. Legislative power ceases at the line of the State, and judicial power must also cease at that point. Jurisdiction relates to subject matter, to person, and to property. Hence the ordinary exercise of it must be founded upon the person being within the State if a personal determination is involved, or the property must be within its territory if that is the subject of this controversy. In this case, there was no jurisdiction of the person, although the jurisdiction of the property is conceded" (p. 383).

This decision followed the settled judicial authority of the State as illustrated in

> *Wilcox* v. *City of Rochester*, 129 N. Y., 247;
> *Hilton* v. *Fonda*, 86 N. Y., 340.
>
> *Mygatt* v. *Washburn*, 15 N. Y., 316;
> *Litchfield* v. *Vernon*, 41 N. Y., 123;
> *Dorwin* v. *Strictland*, 57 N. Y., 492;
> *Stewart* v. *Crysler*, 100 N. Y., 378;
> *Maltbie* v. *Lobsitz Mills*, 223 N. Y., 227.

In *Barhyte* v. *Shepard*, 35 N. Y., 237, the Court said:

> "Not being an inhabitant at all, it was both a legal and physical impossibility that he should be a taxable inhabitant; he was no more subject to their jurisdiction, as a legal proposition, than was the Emperor of China or the King of Abyssinia, and the as-

sessor had no more power to direct the imposition of a tax upon his property than upon that of those distant personages" (p. 253).

The text writers are unanimous in this limitatation on the taxing power of the state. Thus *Cooley on Taxation*, 3rd Edition, page 24, says:

> "Where a non-resident is owner of tangible property within the state, and the state imposes taxes upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents; neither can the personalty of a non-resident be taxed unless it has an actual *situs* within the state, so as to be under the protection of its laws. * * * The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."

Brown, Jurisdiction of Courts, 2nd Edition, is to the same effect. Section 160, pages 549, 550, says:

> "The state has no jurisdiction to impose any tax directly against a non-resident as a personal charge, creating a personal liability. The power of taxation must be confined to the inhabitants of the state, and it can acquire no jurisdiction over persons residing out of its territory and if such persons have real property within the state, such property may be taxed; but such tax cannot be made a personal charge against the owner, and the assessment amounts to no more than a lien against the thing taxed; and the same rule would apply to personalty; such tax would create no liability against the owner; the remedy must be confined to the thing, and the nature of the assessment is and can be

> no greater than a judgment *in rem* against the thing taxed."

In *State* v. *Ross*, 23 N. J. L., 517, 521, the Court said:

> "A personal tax is the burthen imposed by government upon its own citizens for the benefits which that government affords by its protection and its laws; and any government which should attempt to impose such a tax upon the citizens of other states would justly incur the rebuke of the enlightened sentiment of the civilized world."

A statute imposing a personal tax upon non-residents cannot be justified on any plea that it is limited in amount to less than the amount which that person has received from antecedent acts within the jurisdiction. It may (or may not) seem fair that a person who has made money by transactions within a particular state, and then moved with his property elsewhere, should thereafter gratefully contribute to the support of the state whose protection gave him opportunity to accumulate his fortune. But it would hardly be suggested that the State of New York could impose a tax on a resident of Connecticut or his real estate in Connecticut simply because all his possessions had come from money made by antecedent acts in New York. The question is not at all one of fairness or gratitude, but a question of jurisdiction.

Viewed as imposing a personal liability on the taxpayer this tax does not differ in its jurisdictional aspects from a pure capitation tax. The source of the income does not in any respect change the nature and character of the tax imposed upon the recipient, and it is as much beyond

the power of the state to impose such a personal tax upon a non-resident as it is to impose a capitation tax on him. The question here at issue as to the jurisdiction to impose such a tax at all obviously has no relation either to the extent of the exercise of that jurisdiction, if it exists nor to the reasons for the exercise or non-exercise of it. If the state has not jurisdiction to impose a personal liability for tax on a non-resident, it is immaterial whether that non-resident is engaging in an occupation in the state from which he derives a large income or not. So, also if the state has the jurisdiction to impose a tax, it is immaterial whether the non-resident's occupation in the state is gainful in money or in health or in pleasure. The state either has or has not the jurisdiction to impose a personal liability against a non-resident for the payment of taxes. The cases that we have cited seem to establish that the state has not this jurisidiction and we know of no case to the contrary.

The United States comprises many States and the people travel through them freely for business and pleasure, numbers spending some time in each of several States each year and conducting a multiplicity of transactions in others. They receive protection *pro tanto* from each, whether seeking health, or pleasure, or money.

On the theory of protection to the individual while he is in the state the question of the kind of occupation, and whether gainful in dollars or gainful in health or gainful in pleasure does not seem to affect the jurisdiction to tax. If there is jurisdiction to impose the tax because a man is engaged in a pursuit leading to money, there seems equal ground to impose a tax if a man

is engaged in a pursuit leading to health or pleasure or any other desirable end. If it is once determined that each of these states may impose upon non-residents a personal income tax (and here, anticipating somewhat, it is a tax which discriminates against non-residents), on some theory that the opportunity to gain employment or health, which has bettered the person's financial condition, involved protection which justifies recompense, we should soon have conditions tending to impair the national integrity and intolerable to the individual. States cannot and do not adjust taxation with mathematical nicety, particularly where non-residents who have no representation in their governments are involved. Even double taxation is unfair, but this would mean much worse than that. And if all the laws of all the States were nicely adjusted so that each individual paid only a precisely measured proportion of his income to each of the several States which had afforded him or his transactions some protection during the year, the mere burden of the multiplicity of records and computations would itself work an aggregate of more injustice than can result from adhering to settled limits of State jurisdiction.

The situation here presented in its inevitable effect upon the integrity of the Union is of the same character as that considered by this Court in *Crandall* v. *State of Nevada*, 6 Wall., 35. In that case the Court considered the constitutionality of an act of the State of Nevada levying a "capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." A ma-

jority of the Court were of the opinion that this law did not impose an illegal burden in interstate commerce, but the law was held unconstitutional as being opposed to the very spirit of the Constitution itself. The Court said:

> "But if the Government has these rights on her own account, the citizen also has correlatives rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, *and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it*" (p. 44). (Italics ours.)

And further in discussing the Passenger cases the Court continued:

> "But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: 'Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the

United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union. * * * For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.'

"Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this Court in exposition of that instrument. Those principles, as we have already stated them in this opinion, must govern the present case." (p. 48).

In the leading case of *Robins* v. *Shelby Co.*, 120 U. S. 489, holding that a license tax on drummers selling goods in interstate commerce is unconstitutional, the Court pointed out the disintegrating effect of privilege taxes on citizens of other States, saying:

"If the right exists, any New York or Chicago merchant visiting New Orleans or Jack-

> sonville for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license." (p. 496).

The argument that it is fair that a citizen of Connecticut earning his income in New York should pay a tax to that State for the protection afforded him therein is political and legislative rather than judicial. If this argument can be properly considered by the Court, it must be weighed against the mischievous effects upon the integrity of the Union and from this standpoint the tax in question would seem inconsistent with the very spirit of the Constitution.

(3) The provisions of the statute here cannot be sustained as a tax on property.

In the case at bar, there is no room for any suggestion that the tax on income from property within a State may be justified by jurisdiction over the property. The sole question here relates to the net income computed by deducting sundry sums from salaries for personal services performed within the State. There is no property within the State yielding any of the income here involved.

The case is further narrowed by the fact that the person paying the salaries is a Connecticut corporation, a citizen and resident of another State. The statute, of course, applies equally to a non-resident natural person having an office in New York and employing non-residents to work there, or to any other case where the services of the employee alone are in New York and the salary is contracted for, owed and paid by one non-resident to another non-resident outside New York. Here, and in any such case, it is, we submit, impossible to say that there is any property within the jurisdiction of the State, and the statute cannot be justified on that ground.

A "net income" under this statute is not an article of property, but a measure of the condition of the person receiving and enjoying it. A debt of ten thousand dollars may be paid to one person or to ten, but remains a fixed measurable amount. Ten thousand dollars paid in gross salaries means nothing as to the net income of the recipients without consideration of their number and personality. Ten thousand dollars in salaries paid to a number of recipients may after the com-

putation yield an aggregate of net incomes entirely different from that which it yields if paid to one. The personal condition of the recipient, and not the amount or character of the payment made, constitutes and determines the fact of net income. It seems, therefore, impossible to conceive a net income for purposes of this taxation separate and distinct from the person receiving it.

A debt or chose in action is valueless except by virtue of the laws of the residence of the debtor, which may be invoked to enforce it. But here the laws of New York do not create, give validity to, or affect, the income of appellee's non-resident employees. They are employed and paid in Connecticut, whose laws govern the contract of employment and whose Courts enforce the contract. The services rendered are not income. The services are performed in whole or in part in New York. The net income never has any existence in New York.

The gross salary here is not owing by, or to, anyone in New York. The fact that the appellee can legally transact business in New York obviously makes no difference in the situs of the obligation. It merely places the appellee in a position to transact business in the same manner that it could if it were a natural person instead of a corporation. Where even the gross salary has no situs in New York, certainly the "net income" ultimately computed therefrom has no situs there.

Moreover, property to be taxable in a State must have some permanency there, and not be merely temporarily within the State.

> *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S., 409;

Morgan v. *Parham*, 16 Wall, 471;
Buck v. *Beach*, 206 U. S., 392;
Union Transit Co. v. *Kentucky*, 199 U. S., 194;
Louisville etc. Ferry Co. v. *Kentucky*, 188 U. S., 385;
Delaware, Lackawanna & Western R. R. v. *Pennsylvania*, 198 U. S., 341.

It is, we submit, impossible in the present instance to find any specific property within the State of New York with enough permanency to subject it to the jurisdiction of the State; and if this tax could be considered a tax on the net income as property it would be void.

In *Buck* v. *Beach* (206 U. S., 392), notes made and payable in Ohio, were owed by a resident of New York, and kept by the owner in Indiana in the hands of an agent there. It was held that a tax on these notes by the State of Indiana was a taking of property without due process of law. The presence of the notes in Indiana did not give the property a taxable situs in that State. The Court said:

> "Generally, property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax. *State Tax on Foreign Held Bonds*, 15 Wall, 300; *Erie Railroad* v. *Pennsylvania*, 153 U. S., 628, 646; *Savings Society* v. *Multnomah County*, 169 U. S., 421, 427; *Louisville etc.* v. *Kentucky*, 188 U. S., 385; *Delaware, etc.* v. *Pennsylvania*, 198 U. S., 341; *Union Transit Co.* v. *Kentucky*, 199 U. S., 194; *Metropolitan Ins. Co.* v. *New Orleans*, 205 U. S., 395 (p. 400).
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> "Our decision in this case has no tendency to aid the owner of taxable property in any

effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts, evidenced by the notes, in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there and which if so taxed would make double taxation almost sure, which is certainly not to be desired and ought, wherever possible, to be prevented.

"For the reason that as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana the State had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law" (p. 408).

In *Union Transit Co.* v. *Kentucky*, 199 U. S., 194, it was held that Kentucky could not tax a domestic corporation on tangible property permanently located outside the State. The Court said:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegience and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of

an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company* v. *Jackson*, 7 Wall, 262; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Tappan* v. *Merchants' National Bank*, 19 Wall, 490, 499; *Delaware, etc. R. R. Co.* v. *Pennsylvania*, 198 U. S., 341, 358. In *Chicago etc. R. R. Co.* v. *Chicago*, 166 U. S., 226, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. See also *Davidson* v. *New Orleans*, 96 U. S., 97, 102; *Missouri Pacific Railway* v. *Nebraska*, 164 U. S., 403, 417; *Mount Hope Cemetery* v. *Boston*, 158 Massachusetts, 509, 519" (p. 202-203).

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"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any Court. It is said by this Court in the *Foreign-held Bond case*, 15 Wall, 300, 319 that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

"The argument against the taxability of land within the jurisdicition of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396: 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government.' See also *McCulloch* v. *Maryland*, 4 Wheat, 316, 429; *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, 599; *St. Louis* v. *Ferry Co.*, 11 Wall, 423, 429, 431; *Morgan* v. *Parham*, 16 Wall, 471, 476" (pp. 204, 205).

The State of course has jurisdiction to impose a tax on property permanently within its borders, whether real or personal, and whether tangible or intangible and regardless of the residence of the owner.

Thus property taxes were sustained against intangible personal property belonging to non-residents in,

Tappan v. *Merchants Nat. Bank*, 10 Wall, 490;

Bristol v. *Washington Co.*, 177 U. S., 133;
Liverpool & L. & G. Ins. Co. v. *Orleans* Assess. 221 U. S. 346;
New Orleans v. *Stempel*, 175 U. S., 309;
Scottish Union & Nat. Ins. Co. v. *Bowland*, 196 U. S., 611;
State Board of Assessors v. *Comptoir Natl.*, 191 U. S., 388;
Rogers v. *Hennepin Co.*, 240 U. S., 184;
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S., 395.

But in each case where a tax has been sustained on the ground that the property subject to tax had a taxable situs in the State, while the owner was a non-resident, there were present two factors which have been universally recognized as essential to jurisdiction—first, that there must be in existence some definite and specific property, and second, that that property must in a real sense have a situs in the taxing state.

Thus in *State Tax on Foreign held Bonds*, 15 Wall, 300, it was held that a State could not tax the interest on bonds issued by a domestic corporation owned by a non-resident and possessed outside the State. The Court said:

> "We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention of the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property

is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this Court. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State" (pp. 325-326).

In *Board of Assessors of New Orleans* v. *New York Life Ins. Co.*, 216 U. S., 517, *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S., 395 (*supra*) was distinguished. Both cases came up under the same statute, and each assumed to impose a local tax against a foreign corporation on the basis of an alleged debt from its policy holder. In the Metropolitan Case it was held that there was a real debt constituting a real property interest having a local situs. In the New York Life Case the tax was held illegal, because there was not a real property interest having a local situs. The case is stated in the headnote:

"Where a policyholder simply withdraws a portion of the reserve on his policy for which the life insurance company is bound, and there is no personal liability, it is not a loan

> or credit on which the company can be taxed as such, and this is not affected by the fact that the policyholder gives a note on which interest is necessarily charged to adjust the account. To tax such accounts as credits in a State where the company has made the advances would be to deprive the company of its property without due process of law."

In each of these cases the foreign corporation was engaged in business in the taxing State. Where, therefore, there existed actual property which could fairly be given a situs in the State, it was held taxable; but where the business did not give rise to a property right which could have such a local situs, no tax could be imposed. In other words, legal fiction could not be resorted to to sustain a tax on alleged property which did not in fact exist.

Applying the converse of the rule, the Court has held that a State having personal jurisdiction over a taxpayer may tax him upon all his property wherever located, provided it has not acquired a taxable situs elsewhere. Thus in

Hawley v. *Malden*, 232 U. S., 1,

the Court upheld a State tax against a resident of the State on shares of stock in foreign corporations which did no business or owned no property in the State.

In *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, a Kentucky tax against a resident upon money deposited in a Missouri bank was sustained upon the dual ground of a personal tax against the owner, and a property tax on the theory that *Mobilia sequuntur personam*.

And in *Southern Pacific* v. *Kentucky*, 222 U. S., 63, in holding that a domestic corporation may be taxed on all of its property which has not acquired a permanent situs elsewhere, the Court said:

> "Since, therefore, an artificial situs for purposes of taxation is not acquired by enrollment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence, and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government. Thus in *St. Louis* v. *Ferry Co.*, 11 Wallace, 423, 430, this Court, after referring to the taxing power of a State as extending to all persons and property within its territorial jurisdiction, said: 'In the eye of the law personal property, for most purposes, has no locality. * * * In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction

> exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. Whether the personal property of a resident of one State situate in another can be taxed in the former, is a question which in this case we are not called upon to decide'" (pp. 68, 69).
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> "The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation.
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> "The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there have been such flagrant abuse as may be remedied by some affirmative principle of constitutional law." (p. 76).

The cases in which the Courts have held that choses in action may acquire a situs different from the residence of the owner are not in point. A chose in action has not yet been paid. The debtor has only promised to pay it, and its value depends on the promise of the debtor. The actual money to pay the chose in action is in the State where he resides.

But here the income is derived, paid, and re-

ceived. It is out of the State, and there is nothing in the State that represents it. It is a confusion of ideas to say that it is represented by the business done in the State. The non-resident who is employed by the plaintiff in the State of New York, and does work in the State of New York has nothing in the State representing the income. He is employed in Connecticut or in New Jersey, and comes into New York and does his work, and goes back. In most cases he receives the payment for the service rendered out of the State. But the place of payment is immaterial. The obligation to pay is clearly located at the common residence of the debtor and the creditor, and the situs of that chose in action is clearly not New York. An income is not a chose in action, but in possession; and in this case in fact, as well as in law, is at the residence of the owner.

Furthermore, the income tax is not assessed upon all money that comes into the recipient. It is only after the net amount has been determined after deducting from the gross receipts certain allowable expenses by way of deductions that the taxable amount is determined. Before that amount is determined and before any assessment can be laid thereon, most of the income, both gross and net, has been expended. The theory of a property tax is that it is a lien on the property taxed. Obviously the State cannot lawfully impose a tax lien upon property which is not itself in existence. The proposition is necessarily a contradiction in terms.

Here it is clear that the personal condition of the recipient and not the amount or character of the various payments made, constitutes and de-

termines the fact of income. It is, therefore, impossible to conceive of an income for purposes of taxation separated and distinct from the recipient of that income.

This condition is still further emphasized in the facts in the case at bar. The plaintiff's employees derive their income from the wages and salaries paid to them by the plaintiff. But the plaintiff is a non-resident of the State of New York. In the cases in which a chose in action has been held to have a taxable situs at the residence of the debtor, the decision was based upon the ground that the creditor could not enforce his debt except by virtue of the laws of the State imposing the tax.

But here the employees of the plaintiff need not resort to the courts of New York to enforce their claim for compensation for their personal services against the plaintiff. These employees are residents and citizens of Connecticut. The plaintiff is a Connecticut corporation. The claim for compensation will be made against it in Connecticut, and the employees are in no way affected by the laws of New York regulating or interfering with such compensation.

It is, we submit, clear that the income received by the plaintiff's employees from their personal services has no taxable situs as property in the State of New York, and that if this tax be regarded as a property tax, it is imposed upon property without the jurisdiction of New York, and is unconstitutional and void.

While this precise question is one of original impression the *ratio decidendi* of other cases in this court supports this conclusion. In *State Tax on Foreign Held Bonds* (*supra*), the tax was held void as an attempt to tax a subject outside the

jurisdiction of the State. The fact that the interest on the bonds was earned and paid in the State imposing the tax did not suffice to give the State jurisdiction to tax.

The recent case of *Deganay* v. *Lederer*, 250 U. S., 376, is not inconsistent with this position. There this Court sustained the Federal income tax levied on the income from American securities owned by a foreigner, the physical custody of which, however, was held by a resident of the United States, who had full power of attorney to sell and otherwise control the investment, and to collect the income therefrom. The question there presented was entirely of the income from property over which the United States had admitted jurisdiction, received by an agent who was also within the jurisdiction. That case is distinguishable from the one at bar because the income there was a tangible entity, having reference to the property producing it, without regard to the owner of the income, which income was received and collected by a resident agent. The distinction between a tax on the income from property and a tax on the income from occupations and professions was clearly pointed out in *Pollack* v. *Farmers Loan & Trust Co.*, 158 U. S., at pages 635 and 637.

Then too, the power of the Federal Government to tax foreigners rests upon an altogether different basis from that of the several States to tax the citizens of the sister States. The distinction between the rights of the citizens of the several States, which are assured by the Constitution, and those of foreigners, who may be completely excluded from the United States, is pointed out in *U. S.* v. *Bennett*, 232 U. S., 299, and

more specifically in *Railroad* v. *Collector* (100 U. S., 595, *supra*), where the Court said:

> "Whether Congress, having the power to enforce the law, has the authority to levy such a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the Government no allegiance, is a question which we do not think necessary to the decision of this case.
>
> "The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. * * *
>
> "It is very true that the act went further and declared that except when the company had contracted otherwise it might deduct this tax from the amount due the bondholders. And where the bondholder was subject to Congressional legislation by reason of citizenship, residence or *situs* of the property taxed, it was within the lawful power of Congress to do so. Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss, for this court, on all such subjects, is bound by the legislative and political departments of its own government" (pp. 597, 598, 599).

(4) The provisions of the statute taxing non-residents cannot be sustained as imposing a privilege or license tax.

The recent decisions of this Court seems to establish definitely the proposition that a tax on net income is not to be treated as a tax on the business from which the gross income is derived; that is as an occupation or business tax. In *Peck & Co.* v. *Lowe*, 247 U. S., 165, it was argued that "a tax on income is a tax on the source from which the income is derived," and since the income in controversy was income from shipping goods to foreign countries, the tax conflicted with the provision prohibiting any tax on articles exported from any State. This Court pointed out that the tax was laid generally on net incomes, and said:

> "The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins" (p. 175).

In the case at bar the tax is not on the gross salary or gross income but is a tax measured by the net income after deductions of expenses and losses and after the recipient is free to use it as he chooses.

In *U. S. Glue Co.* v. *Oak Creek*, 247 U. S., 321, the Court held that a State may include in the computation of net income under a general income tax law the net income derived from transactions in interstate commerce, saying:

> "It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule" (p. 326).

In these cases the distinction was drawn between a tax on net income depending solely upon jurisdiction over the person of the taxpayer, and a business or occupation tax depending upon jurisdiction over the source of the income. The *ratio decidendi* of these cases classifies the New York tax here in question as a subjective tax, depending for its validity upon jurisdiction over the person of the taxpayer, and forbids its classification as a business or occupation tax.

This statute does not purport to impose a privilege, occupation or license tax. It imposes on nonresidents a tax on income from property and business and occupations indiscriminately. There is no attempt to prohibit or require a fee for the transaction of business, but the statute taxes the persons enjoying net income after the year's business has been transacted, the receipts, expenses and losses experienced and the prescribed computations made.

And to construe this tax as a privilege or license tax would be to make the statute unconstitutional, because it would then rest upon the assumption that what was done depends upon the State's consent and the State of New York has no power to exclude citizens and residents of other States generally from transacting any business in the State of New York.

> *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S., 333, at page 340;

Provident Savings Life v. *Kentucky,* 239 U. S., 103;
Allgeyer v. *Louisiana,* 165 U. S., 578;
Truax v. *Raich,* 239 U. S., 33.

Section 351 (Rec., p. 28) of the law imposes a tax "upon every resident of the State, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined." As to residents of the State, the tax is imposed upon all income that they receive, regardless of whether the State has jurisdiction over the source of the income or not. A resident of the State, owning real property in Connecticut from which he derives a net income in the shape of rentals, pays a tax upon this income to the State of New York. Both the phraseology of the law imposing the tax upon the person of the resident, as well as the scope of the sources of the income subject to tax, show beyond question that as to residents of the State the tax is a purely personal tax.

As to non-residents, the language of Section 351 is: "A *like* tax is hereby imposed and shall be levied, collected and paid * * * upon and with respect to the entire net income as herein defined * * * from all property owned and from every business, trade or occupation carried on in this State by natural persons not residents of the State." The tax on non-residents is defined as a "*like*" tax as that imposed upon residents. Since without dispute the tax on residents is a personal tax, there is here a formal legislative declaration that the tax on non-residents is also "a like tax,"—that is, a personal tax. This is expressly conceded by the appellant at page 10: "It is obvious that

the tax on residents and non-residents is the same, regardless of the different phraseology so far as both are taxed."

The personal tax on residents is levied and collected "upon and with respect to his entire net income as herein defined," and the tax on non-residents is also levied and collected "upon and with respect to the entire net income as herein defined." The fact that with regard to non-residents certain sources of income outside of the State are excluded from the computation of the entire net income, which are included in the computation as affecting residents, seems not to change the nature of the tax itself. It is clear that the nature of the tax cannot be determined by the subjects excluded, but rather by the imposition of the tax on such subjects as are affected. Paraphrasing Section 351 of the act, a personal tax is imposed upon residents and non-residents of the State, the tax to be measured in both cases by the net income received as hereafter defined, the definition of what is included in the net income varying as between the residents and the non-residents.

Furthermore, there is no distinction or difference made in the tax against the income of non-residents derived from property owned in the State and from every business, trade, profession or occupation carried on in the State. Obviously a license tax could not lawfully be exacted from a non-resident because of the ownership of property in the State. The property in the State can be taxed, being subject to the State's jurisdiction, but no license fee can be imposed upon a non-resident for the privilege of owning such property. The tax as to property must be a tax on the property

within the jurisdiction. The fact that the income from property and from business and occupations is grouped together in one sentence without separation is further indication that the tax is in fact a personal tax against the owner of the income, and is not intended to be a license fee for the privilege of doing something that the State, under the police power, can prohibit.

If this tax could be regarded as a license or occupation tax, it would impose a direct burden on interstate commerce.

The plaintiff is engaged extensively in interstate commerce, and its employes are engaged in New York in large part in the furtherance of such interstate commerce. The same is true of many non-residents engaged in whole or in part of their working time in the State of New York. Some of the plaintiff's employes are travelling salesman, who come into New York to solicit orders for goods for shipment into New York from Connecticut. Under the regulations of the Comptroller annexed to the complaint, the earnings of such travelling salesmen while engaged in selling goods in interstate commerce are expressly subject to this tax. So construed the tax would be necessarily a direct burden upon interstate commerce and unconstitutional.

> *State Freight Tax Case*, 15 Wall, 232;
> *Robins* v. *Shelby Co.*, 120 U. S., 489;
> *Asher* v. *Texas*, 128 U. S., 129;
> *Laloup* v. *Port of Mobile*, 127 U. S., 640;
> *Walling* v. *Michigan* 116 U. S., 446.

(5) The statute cannot be sustained on the theory that the State of New York has in fact power to collect the tax.

The brief of the Attorney General seems to proceed upon the syllogism: The power of a State to enforce its taxes measures its jurisdiction; in the present instance, the State of New York has power to enforce a tax on the net incomes of non-residents; and, therefore, the tax is constitutional.

We respectfully deny the premises. It is not going too far to say that in every case in which this Court has held unconstitutional a State law imposing a tax on persons or property outside its jurisdiction, the State had power to enforce the tax, because otherwise the case would not have been brought. For instance, in *Board of Assessors of New Orleans* v. *New York Life Insurance Co.*, 216 U .S., 517, and *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 153 U. S., 628, the corporations were authorized to do business in the State, and the State had power (in the sense in which we understand the word is here used) to collect from them and tax up to the limit of their resources in the State. So, in, say, *Morgan* v. *Parham*, 16 Wall, 471 or *Louisville, etc. Ferry Co.* v. *Kentucky*, 188 U. S., 385, the State had power to seize the vessels temporarily within its territorial jurisdiction but that did not give it jurisdiction to impose the taxes.

As between nations, the proposition that power to collect is the test of right to tax may be correct. Just as foreigners may be completely excluded from the United States (*United States*

v. *Bennett,* 232 U. S., 299), so anything that the United States can in fact seize it may perhaps tax. That, as said by this Court in *Railroad* v. *Collector,* 100 U. S., 595, "we need not discuss, for this Court on all such subjects is bound by legislative and political departments of its own government" (p. 599). But the power of the individual States of the Union is limited by the United States Constitution. One of the limitations is that a State cannot take property without due process of law. And "no principle is better settled" than that taxation by a State of persons or property outside its jurisdiction and within the jurisdiction of another State constitutes a taking of property without due process of law.

The second premise that the State of New York here has power to collect the tax on the net income of non-residents, seems equally erroneous. The non-resident, not being within the territorial jurisdiction of the State, cannot personally be reached. His net income, owned and enjoyed in Connecticut, is out of reach of the State of New York exactly as his real estate in Connecticut is. Even his gross salary, for instance the money paid to him in Connecticut by a citizen of Connecticut, has never been within the territorial limits of the State of New York. The State has no power to reach him or his net income. What it has attempted to do here is to make a third party, the appellee, who is doing business and owns property in New York, personally liable for an amount in excess of the net income, trusting to appellee's relations with the non-resident to exert sufficient force to induce the non-resident to "make, under oath, a complete return of his gross income, both within

and without the State" (Sec. 367, Rec., p. 37), and thus get at the amount of his taxable "net income" and collect it. The resort to the imposition of personal liability on a third party for a percentage of the gross salary as the only means of enforcing a tax on non-resident's "net income" seems to confirm the conclusion that the non-resident and his net income are not within the jurisdiction of the State, and the attempt to tax him on it is, accordingly, not due process of law.

(6) The tax on non-residents cannot be sustained on any theory that the State of New York protects their net income.

It is suggested that the State's protection is a justification of taxation. But that would not justify this tax on non-residents. The employee of the appellee, a citizen and resident of Connecticut, receiving his salary from a Connecticut corporation in Connecticut, is not aided by the State of New York in the enjoyment or protection of the net income computed therefrom. He and his income are protected by the State of Connecticut.

The State of New York has afforded protection to all persons and things temporarily or permanently within the State. The existence of its protection may have enabled many citizens and residents of other States to possess and enjoy much of their real and personal property located in such States. But the protection which justifies taxation is not merely some antecedent protection suggesting the propriety of gratitude. The State of New York affords no more protection to the net income of a citizen and resident of Connecticut than it affords to his real estate there. He might perhaps properly be grateful to the State of New York for protection which enabled him to secure either, but his protection in the enjoyment of the thing to which the tax refers, is in both instances afforded by the State of Connecticut. Protection is not synonymous with jurisdiction, and no consideration of having afforded protection can give the State of New York a right to tax non-residents or their property outside the jurisdiction of the State.

POINT III.

The provisions of the statute taxing non-residents are unconstitutional because they discriminate against citizens and residents of Connecticut and New Jersey.

The opinion of Judge Knox in the Court below proceeds upon the ground that since this statute discriminates against citizens of other states and in favor of citizens of New York, it conflicts with the "privileges and immunities" clauses of the Fourteenth Amendment and Article IV. of the Constitution and that made it unnecessary to consider other grounds. (Rec. p. 60, *et seq.*) We here note **(1)** the more important of the cumulative discriminations in fact made and then **(2)** the application of the constitutional provisions thereto.

(1). The statute imposes a materially higher tax upon non-residents than upon residents.

(a) Section 362 (Rec., p. 33) of the Statute provides certain exemptions: $1,000 for a single person $2,000 for the head of a family and $200, for each dependent; and these exemptions are limited to residents. Concretely, this means that of two persons employed by the appellee at the same task in the State of New York, and each receiving say $2,000, one living with his wife in New York pays no tax and the other living with his wife in Connecticut pays $20.

The provision is not that the non-resident shall be entitled to such proportion of the exemptions as his gross income from the State of New York bears to his total income. The State of New York attempts to tax all the income of the non-resident that has any possible connection with the state, with an important exception based on preserving a market for New York securities. It declares that one man shall pay a tax, or more tax, and another who does and has precisely the same, shall go free, or pay less, according to state lines and nothing else.

(b) Section 360, Paragraph 5 (Rec., p. 32), provides that a resident may deduct losses incurred in any transaction entered into for profit though not connected with the trade or business "but in the case of a tax payer other than a resident of the state, only as to such transactions within the state."

This means, concretely, that if two employees of the appellee, each receiving a salary of $5,000.

a year, together enter into a business venture in Philadelphia resulting in a loss to each of say $5,000. during the year, one deducts his loss and pays no tax, and the other cannot deduct any part of the loss (because the business transaction was not within the state) and pays a tax of $50.

(c) Section 360, Paragraph 6 (Rec., p. 32), provides for the same discrimination with regard to the losses of a slightly different character. The resident may deduct losses for fires, etc. of property not connected with the trade or business. The non-resident cannot deduct such losses unless the property is within the state.

To illustrate again, two employees of the complainant sustain losses of property through the burning of their homes. One, residing in New York, may deduct the amount of his losses, the other residing in Connecticut, can deduct nothing and pays the full amount of the tax.

(d) Section 360, Paragraph 11 (Rec., p. 33), provides as to various deductions from gross income in computing net income

> "In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the Comptroller."

To illustrate again, of two employees of the complainant doing the same work and receiving

the same salary, and owning their homes, one, residing in New York, deducts his real estate taxes under Paragraph 3, while the other, residing in Connecticut, is not allowed to deduct his like tax but pays on the full amount to the State of New York. Or one finds that a debt due from a transaction is worthless and charged off and deducted under Paragraph 7, while the other, sharing perhaps in the same credit, cannot deduct his loss and pays the full tax.

(e) Section 366 (Rec., p. 36), provides that "every withholding agent shall deduct and withhold two percentum from all salaries" etc. of non-residents. The tax imposed by Section 351 (Rec. p. 28) is at the rate of one per cent. on net incomes up to \$10,000; two per cent. between \$10,00 and \$50,000; and three per cent. in excess of \$50,000. Upon the advice of the Attorney General, the Comptroller announces in his regulations (Rec., p. 51) that withholding agents (contrary to the words of the statute) shall deduct and withhold only one per cent. on the first \$10,000.

It seems apparent that the law as written requiring the withholding of two per cent is unconstitutional. There is no other law; and there seems to be no power in the Attorney General or the Comptroller to require the appellee to withhold any other per cent.

There are other inequalities such as the requirement that the non-resident lose the enjoyment of his money by having it withheld on an average of nine months before the resident is required to pay any taxes (Art. 262, Rec. p. 51, Sec.

371, Rec. p. 38) and the placing of a burden on the non-resident to recover back from the percentage of his gross salary paid the state, the amount justified by his deductions, (Secs. 366, 53, 367, Rec., pp. 36, 37). But for present purposes it seems enough to note that the statute imposes cumulative discriminations and materially higher taxes solely according to state lines.

(2) The provisions operating to discriminate against appellee's non-resident employees conflict with Section 2 of Article IV of the Constitution and the "privileges and immunities" clause of the Fourteenth Amendment.

The Bill of Complaint recites that appellee's non-resident employees are citizens of the States of Connecticut and New Jersey wherein they reside (Rec., p. 2b). As pointed out in the opinion below (Rec. p. 64) by the Fourteenth Amendment, it is declared that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." We are, accordingly, dealing here with a case wherein the rights of citizens of Connecticut and New Jersey are involved.

Those citizens are entitled under the Constitution to go freely into the State of New York and work there on terms of equality, as to taxation, with the citizens of New York. The citizen of another State has no vote or representation in New York, and it may be to the interest of the State of New York so to discriminate against him as to induce his taking up his residence in New York and thus become a citizen thereof. The Constitution alone affords any protection against such discrimination. Its first purpose was "to form a more perfect Union." Section 2 of Article IV was designed to carry out that purpose. "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this," (*Paul* v. *Virginia*, 8 Wall, 168, 180). Because it

has to do with promoting "a more perfect Union" and constituting the citizens one people, it seems that this freedom from discriminatory legislation properly belongs to the individual as a citizen of the United States and is also within the "privileges and immunities" clause of the Fourteenth Amendment.

There can be no doubt that this statute in fact "cannot operate without depriving citizens of other States of privileges and immunities which are open to citizens and residents of New York" (Rec., p. 63). The statute uses the term "resident," but its operation is necessarily to defeat the constitutional right of citizens of other States, and the purposes sought to be attained by the Constitution. We respectfully refer to the decisions quoted and cited in the opinion of the Court below (Rec., pp. 60, *et seq.*) and submit that the Court accurately summarized these aspects of the case when, after quoting from the Fourteenth Amendment, it said:

> "It is this provision of the Constitution along with the second section of Article IV and the Interstate Commerce Section of our fundamental law that have been largely responsible for the community of interest, the unanimity of purpose, the united effort, and the magnificent accomplishments of our people. If now, under one pretence or another, the States are to erect economic and taxation barriers along their boundaries, it is but a question of time when the citizens of the various States will for all practical purposes be burdened with the disabilities of alienage, and this would be intolerable" (Rec., p. 64).

But it is said that classification is not forbidden by the Constitution, the classification here is residence and the imposition of a higher tax on nonresidents than on residents is a reasonable exercise of the power of classification. Some of the difficulties with that suggestion seem to be:

(a) A statute which in fact operates to defeat rights secured by the Constitution cannot be justified by invoking the necessity of classification in taxation or by the fact that the words of the Constitution do not appear in the statute. In *Chalker* v. *Birmingham & N. W. Ry. Co.* (249 U. S., 522) the Court said:

> "The power of a State to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any State enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States.
>
> "Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained by established justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system." *Ward* v.

> *Maryland*, 12 Wall, 418, 431; *Guy* v. *Baltimore*, 100 U. S., 434, 439; *Blake* v. *McClung*, 173, U. S., 239, 254; *Darnell & Son Co.* v. *Memphis*, 208 U. S., 113, 121.
>
> "As the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee are required to pay" (pp. 526, 527).

In this case the discrimination was not in words based upon citizenship. A tax was graded in amount according to whether or not the taxpayer had his principal office in Tennessee.

In *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S., 364, the Court found that there was in fact no discrimination against non-residents in the taxation by the State, implying that if there had been, it would have been condemned.

There is no relevancy in cases where the State is dealing with a privilege which it may grant or withhold, such as those relating to foreign corporations doing business in the State, or succession taxes, or the nation's treatment of foreigners, because they do not deal with discrimination against persons having rights secured by the Constitution.

In *La Tourette* v. *McMaster*, 248 U. S., 465, it was held that the power of a State over insurance justified it in requiring brokers to be residents of the State or to have been licensed insurance agents of the State for at least two years, because the requirement provided appropriate means to benefit the insurer and insured, and was accordingly

a proper exercise of the police power. Its irrelevance is apparent when the statute here is considered as changed to resemble that insurance statute by supposing the State of New York to have required that no one should engage in any "business, trade, profession or occupation carried on in this State" (Sec. 351) except residents.

In brief, there is no case conflicting with the opinion of Judge Knox in the Court below, and it has been directly confirmed by *Chaulker* v. *Birmingham, etc., Co.* (*supra*, 249 U. S., 522).

That some of the cumulative discriminations are in deductions does not take them out of the rule. In *People* v. *Weaver* (100 U. S., 539), a New York statute permitted a taxpayer to deduct his debts from the valuation of all his personal property, except so much thereof as consisted of national bank shares. In holding this illegal the Court said:

> "We are, therefore, of opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the Act of Congress, and the judgment of that court will be reversed and the case remanded for further proceedings in conformity to this opinion" (pp. 546, 547).

So, in *Sprague* v. *Fletcher,* 69 Vt., 69, it was held that a statute allowing residents to deduct the amount of their debts from their taxable property but denying the same privilege to non-residents, was unconstitutional.

(b) In addition to that and dealing with the "equal protection of the laws," classification between residents and non-residents, accompanied

by different treatment of the two classes, seems to present exceptional aspects from the point of view of our constitutional law. The non-resident is not a voter and lacks the protection which that power secures to the resident. On the other hand, it is generally to the selfish interest of a State to discriminate against non-residents, because that tends to encourage residence within the State, and a consequent increase in its taxpayers and prosperity. In the present instance, for example, if this law could be sustained, of two houses suitable for rental to persons earning in New York City a salary of $2,000, one should rent for $15 more than the other, solely because located in New York instead of Connecticut, other things being equal, since the person living in the house in New York would save at least $20 in taxes. For the reasons thus suggested, discrimination against non-residents seems to require more justification than discrimination between classes both having a voice in the government or discrimination which cannot affect the commercial or political integrity of the nation.

The discrimination here is plainly unreasonable. It is obviously unreasonable to make one man pay $20 in taxes and another nothing in taxes, when both do and have precisely the same. The only suggestions which we have seen to the contrary are two:

One is that since the non-resident pays New York only upon income from within that State and the resident pays on all his income, the total amount of payment to New York may be greater by the resident. But that is merely to say that because the State of New York cannot reach all the property of a non-resident, it is justified in taxing such part as it can reach, at a rate high enough

to make the non-resident's total payment to New York equal the total payment of the resident. If a State imposes a higher rate of tax on the particular kind of property within its jurisdiction, because owned by a citizen and resident of another State, the injustice is not diminished by the fact that the State has jurisdiction over the person of its residents and so can impose larger aggregate taxes on him, or by the assumption that other States impose no taxes on their residents.

The other suggestion is that some day other States may impose like taxes of just the same amounts with just the same provisions and the injustices will then be relieved by the balance. That seems plainly too theoretical and speculative for consideration. And it does not meet the existing wrong.

As pointed out in the Court below, the discrimination here is a matter of real "importance to the thousands of persons, residents and citizens of adjoining States, who daily come into this State and here contribute to its welfare and prosperity" Rec., p. 62). The appellee's employees not large owners of real estate, are the taxpayers in the case at bar. It is matter of common knowledge or, as the Court below puts it, "the personal knowledge of us all" (Rec., p. 63), that thousands of the taxpayers they represent are without income except what they earn by their work. To attempt to justify the actual hardship of the discrimination against them by imagining each possessed of a large income from other sources is to depart widely from actualities.

Finally, this argument as to reasonable classification, even if accepted, would not justify this statute. It would, at most, justify only a tax allowing non-residents such proportion of the ex-

emptions and deductions allowed residents as their income from sources within the State of New York bears to their total income. It does not alter the conclusion that the discriminatory tax here is unconstitutional and void.

The misconception of the power of the State over citizens and residents of other States of the Union, which is found in these discriminations, is further illustrated by Section 363 (Rec., p. 34) of the statute, which provides, in substance, that if other States retaliate, the State of New York will grant such credits to non-residents as other States may grant to residents of New York.

This seems to proceed upon the notion that the State of New York may act as a wholly independent sovereign, without regard to the obligations of the Federal Constitution. It seems plainly to embrace three things: (a) A recognition of the fact that this statute imposes an onerous tax on residents of neighboring States, which will logically result in those States imposing like taxes on residents of New York; (b) an offer to mitigate the hardship if the residents of New York are similarly attacked and reciprocal consideration is shown them by the neighboring State, and (c) the maintenance of that hardship as against residents of States which do not retaliate and accept the reciprocal consideration tendered.

Thus, if New Jersey and Connecticut retaliate by taxing residents of New York, and New Jersey alone accepts this offer of reciprocal consideration, we shall have New York imposing one tax or rate of tax upon its residents, another tax or rate of tax on residents of New Jersey, and a third upon residents of Connecticut and other States.

This seems plainly in the direction of abolishing the Federal Constitution and erecting each State into an independent sovereignty, ready to

enter into treaties with the other States as to how their citizens shall be treated. It plainly conflicts with the first object of the Constitution, "to form a more perfect Union," and the provisions of Article IV, Section 2, and the Fourteenth Amendment.

Since the New York Income Tax Law thus exceeds the jurisdiction of the State and deprives citizens of other States of rights secured to them by the Federal Constitution, the decree should, we submit, be affirmed.

Respectfully submitted,

LOUIS H. PORTER,
ARCHIBALD COX,
Counsel for Appellee.

[3799]

APPEAL PRINTING CO., 22 THAMES ST.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 548.

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Appellant,

against

THE YALE & TOWNE MANUFACTURING COMPANY,
Appellee.

MOTION

For leave to file a brief and to take part in the oral argument as amicus curiae

and

BRIEF

In support of the appeal from the judgment herein, made in behalf of William P. Burr, Corporation Counsel of The City of New York, Chairman, William S. Rann, Corporation Counsel of the City of Buffalo, and William J. Wallin, Mayor of the City of Yonkers, as a Committee of the Conference of Mayors and other City Officials of the State of New York.

Submitted by:

LAURENCE ARNOLD TANZER,
WILLIAM P. BURR,
WILLIAM S. RANN,
WILLIAM J. WALLIN,

As amici curiae on behalf of Conference of Mayors and other City Officials of the State of New York.

(17944) M. B. Brown Printing & Binding Co., New York

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MOTION.

Now comes Laurence Arnold Tanzer, an attorney and counsellor of this Court, and represents that he is counsel for the Conference of Mayors and other City officials of the State of New York, composed of Mayors, Corporation Counsels, Comptrollers and other officials of the cities of the State of New York, and that he has been requested to make this application by William P. Burr, Corporation Counsel of The City of New York, Chairman; William S. Rann, Corporation Counsel of the City of Buffalo, and William J. Wallin, Mayor of the City of Yonkers, a Committee of the said Conference, duly appointed by said Conference for the purpose

of presenting to this Court herein argument in support of the constitutionality of the New York Income Tax Law.

That the cities of the State of New York represented in said Conference are vitally interested in the question of the constitutionality of the New York Income Tax Law which is involved in this case, inasmuch as under Section 382 of said Law (Chapter 627 of the Laws of 1919) 50 per cent. of the proceeds of the taxes thereby imposed is to be paid to the treasurers of the several counties of the State for distribution among the cities and towns of the State, and an affirmance of the judgment of the Court below in this case would operate to deprive them of a substantial part of the said revenue.

Therefore he prays leave to file the accompanying brief as *amicus curiae* in support of the appeal from said judgment, and to take part in the oral argument.

Counsel for appellant and for appellee herein have by written consent submitted herewith waived notice of this application, and the Attorney General of the State of New York, as counsel for the appellant herein, joins in this application as is set forth in the said written consent.

SUBJECT INDEX.

TABLE OF CASES CITED.

PAGE

BRIEF.

Statement.

The facts are set forth in the statement of the case in the brief of appellant submitted by the Attorney General of the State of New York.

That brief also contains arguments and authorities in support of the statute in question, repetition of which will be avoided so far as practicable.

The particular grounds of attack by plaintiff on the constitutionality of the act do not clearly appear from the vague allegations of the bill of complaint. From appellee's brief, however, it appears that the act is claimed to be unconstitutional on the following grounds (set forth in the order in which they are discussed in this brief):

(1) That it discriminates against non-residents and thereby deprives them of the equal protection of the laws and denies them the privileges and immunities of citizens of the State of New York. This was the ground on which the statute was held unconstitutional by the Court below.

(2) That it violates the fourteenth amendment by attempting to impose on non-residents a tax beyond its jurisdiction.

(3) That the withholding provisions of the statute are unconstitutional.

We contend that the statute is a valid and constitutional enactment:

(1) It contains no unconstitutional discrimination against non-residents. The differences between them arise from a difference in the base of the tax, which difference in base is itself compelled by the difference in the extent of the state's juris-

diction over residents and over non-residents, and therefore cannot be said to be an arbitrary discrimination. The difference in the exemptions and deductions corresponds to this difference in base and is the result of an effort to equalize, so far as possible, the relative positions of the resident and the non-resident. Non-residents are not in fact discriminated against; whatever hardships may arise are due to the particular circumstances of individual taxpayers. The attack is really on the policy of the law which is not a matter upon which the courts can be called upon to pass.

(2) The tax on the incomes of non-residents from property and business within the state does not exceed the power of the state. A state in the exercise of its power to tax all persons, property and business within its jurisdiction can tax non-residents on their property and business within the state and can measure the tax by the income therefrom. The validity of the tax depends not on its theoretical classification, but on its practical operation and effect. A denial of this power to the states would be a serious impairment of their taxing power.

(3) The withholding provisions are a mere measure of tax enforcement operating only within the territory of the state and well within its power.

POINT I.

The distinction made by the act between residents and non-residents is not arbitrary or unreasonable, but rests on the difference not only reasonable but inherent and inescapable between the limited jurisdiction of the State over non-residents and its plenary jurisdiction over residents.

1. The base of the tax is different and narrower in the case of non-residents than in the case of residents.

The alleged discrimination against non-residents consists in the failure to allow non-residents (a) the personal exemption of $1,000 to a single person and $2,000 to a married person, in addition to $200 for each dependent, allowed to residents by Section 362; (b) the general deductions from income allowed by Seection 360, except when they arise from losses of property within the state or are connected with income arising from sources within the state (sub-div. 6, 11).

This limitation of the exemptions and deductions allowed to non-residents has a direct correspondence with the difference in the base of the tax on non-residents as compared with the base of the tax on residents.

This difference clearly appears from Section 351, imposing the tax.

The first sentence describes the tax on residents as follows:

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually *upon and with respect to his entire net income as herein defined* at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars."

The second sentence describes the tax on non-residents as follows:

> "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, *upon and with respect to the entire net income as herein defined,* except as hereinafter provided, *from all property owned and from every business, trade, profession or occupation carried on in this state* by natural persons not residents of the state."

The tax is thus in both cases an income tax properly described as "a like tax" in its *nature;* but in its measure or *base* the tax on non-residents rests on a much more limited and narrow base than the tax on residents and, as we shall show below, necessarily so.

The tax on residents is based on their *entire net income from all sources,* or what is known as a *general income tax.* The tax on non-residents is a tax only on their net income *derived from sources within the state,* or what is known as a *special income tax.*

This difference in base clearly appears throughout the statute. Section 351 imposes a tax on the resident on "his entire net income as herein defined," and on the non-resident on "the entire net income as herein defined, except as hereinafter provided," from sources within the state. Subject to the limitation to sources within the state, the statute uses the common term "the entire net income as herein defined."

The reference is to Section 357, which defines "net income" as "the gross income of a taxpayer less the deductions allowed by this article."

The "gross income," which is the ultimate base, is defined in Section 359. The definition follows, in a general way, the lines of the federal income tax law. The limitation in the case of non-residents is contained in subdivision 3 and is as follows:

> "In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article."

The non-resident as a class thus pays on a narrower base and therefore pays a lesser tax in the following respects:

(a) He is taxed only on his net income from sources within the state, whereas the resident pays on his entire net income from every source within and without the state.

(b) He is exempted from tax on income even from sources within the state where those sources consist of annuities, bank deposits, notes or other interest-bearing obligations or dividends from corporations not a part of income from business carried on within the state.

(c) He receives a further special exemption if the state of his domicile taxes him on his entire income, in the form of a credit of the proportionate part of the tax paid to his home jurisdiction; this is provided for in Section 363, which will be referred to again below.

That the lesser exemptions and deductions allowed to non-residents correspond to the lesser taxes which non-residents are called upon to pay will be shown below. At this point we wish to emphasize the difference in the base of the tax as between residents and non-residents and to point out its character and that it necessarily follows from the difference in the jurisdiction of a state over residents and non-residents. The difference between the general income tax imposed on residents and the special income tax imposed on non-residents is described as follows in an article by Professor Edwin R. A. Seligman, a leading authority on the subject of taxation, and especially of income taxation, who acted as expert adviser to the legislative committee which drew the law, on " The Taxation of Non-Residents in the New York Income Tax," published in the Bulletin of the National Tax Association for November, 1919, page 40, at pages 45, 46:

> " A personal tax is a tax levied on the person as such; an impersonal tax is a tax levied on the thing rather than on the person. When

the land tax is assessed, as in the state of New York, upon the plot of ground rather than upon the person who owns the land, it becomes an impersonal tax, or what the lawyers call a tax *in rem*. In other words, although of course someone must pay the tax, the law pays no attention to the personal situation of the owner; the tax is imposed upon the land, irrespective of how much the owner may have borrowed upon it. So in the same way, the tax may be levied upon capital or personal property, irrespective of who owns it; or the tax may be levied upon a business irrespective of who carries it on. As opposed to these impersonal taxes, we have the personal taxes; and as the wealth of the individual may be measured in terms either of property or of income, the personal taxes are either property taxes or income taxes. What we have to deal with here are specifically income taxes.

The income tax, however, may either be a general income tax, as in the United States, or it may consist of a series of special income taxes, *i. e.,* taxes on the income from special sources. * * *

These special income taxes may be of several kinds. In the first place, there may be a tax on the income either from the ownership of land or, where there is a distinction between ownership and cultivation, from the cultivation of land. In the next place, there may be a tax on the income from capital or what in this country is called personal property. This may take the form of a tax on the income either from tangible personalty or from intangible personalty, like securities. In the next place, we may have a tax on the income from professions or occupations, including taxes on wages as well as salaries. Finally, there may be a tax on the income from business.

These special income taxes are really akin to the impersonal taxes. It is true indeed

that, as in all other income taxes, an allowance may be made for the personal situation of the taxpayer, so far as concerns the question of indebtedness or of exemptions or abatements. But to the extent that they are assessed on the source of the income, or on the income with respect to the source, they partake to a certain extent of the nature of impersonal taxes levied on the source. Consequently when it is possible to divide a general income tax into its constituent elements and to levy special income taxes, these are more properly to be considered as impersonal, rather than personal, taxes.

The study of the problem of the taxation of non-residents must always bear in mind this distinction between general income and special income taxes, and between personal and impersonal taxes."

The courts even when not having under consideration the precise distinction now under discussion, have been called upon to consider the character, on the one hand, of a tax on the entire net income of an individual, without reference to the particular sources from which any portion of the income was derived, and, on the other hand, of a tax on the income from specific sources.

In *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S., 429; 158 U. S., 601, this Court had before it the question whether a tax on the income from land was a direct tax within the meaning of Article I, Section 9, of the Constitution. The determination of that question was made to turn to some extent on the question whether the tax then before the Court was to be regarded from the point of view of a tax on the income from specific property, or as a tax on a person's entire net income as such. In short, the distinction between a general income

tax and a special income tax was recognized by all the judges, the difference between the judges being as to which category the law then before the Court was to be regarded as belonging, for the purpose of applying the limitation of the power to lay direct taxes. In the opinion of the Court, by Fuller, C. J., the tax was regarded in the light of a special income tax. The Court stated, 157 U. S., 429, at page 581:

> "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land."

White, J., in his dissenting opinion, treated the tax as a general income tax.

On rehearing, this Court held that the tax in question was a direct tax, not only with respect to the income from real estate, but also with respect to the income from personal property. The majority of the Court had now apparently come to agree with the minority that the Federal Income Tax of 1894 was a general income tax and not a special income tax, but held that nevertheless it was a direct tax within the meaning of the federal constitution.

Fuller, C. J., speaking for the Court, said, 158 U. S., 601, at pages 629, 630:

> "The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his

> money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from when it is derived. * * *
>
> "Admitting that this Act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution."

The decision in the *Pollock* case has no bearing on the questions here presented; the opinions in that case are cited because they show that the distinction here involved between a general income tax and a special income tax was present in the minds of the Justices.

The same distinction was the subject of discussion in *London County Council* v. *Attorney General* (1901) Appeal Cases 26. As Lord Macnaghten there showed, at pages 37 and 38, the English income tax was under the Act of 1799 a general income tax which he describes as follows:

> "For the purpose of the tax the income for the current year of persons to be assessed was ranged under four divisions: 'I. Income arising from lands, tenements, and hereditaments. II. Income arising from personal property and from trades, professions, offices, pensions, stipends, employments and vocations. III. Income arising out of Great Britain. IV. Income not falling under any of the foregoing rules.' In the form of return required from the taxpayer, which is given in a schedule, these four heads of income were represented by nineteen 'cases' of which the first fourteen fell under

> Division I. The taxpayer had to return his total income under each and all of these 'cases.' From this total income the taxpayer was allowed to make a great many of deductions under various heads also specified in the schedule * * * The total amount of deductions was to be subtracted from the total amount of income, and the difference was the 'income chargeable.'"

The opinion then states that this general return was found objectionable and that by the Act of 1803 the special income tax was substituted, which has continued in England in various forms to this day. Concerning this tax, the opinion states, at pages 37, 38:

> "By the Act of 1803, in lieu of a general return, particular returns of income from particular sources were required. That was the origin of the five schedules of charge with which we are now so familiar. It was not that there was any difference in kind between the income arising from the different sources. The alteration was made in order to avoid disclosure of the taxpayer's circumstances."

In the New York Income Tax Law there exist side by side a general income tax applied to residents, and a special income tax applied to non-residents—two taxes differing in the base on which they rest, by which they are measured, and to some extent in the method of enforcement.

These differences, as is shown below, rest on the essential difference between the jurisdiction of the state over residents and over non-residents respectively.

2. The difference in the base of the tax necessarily arises from the difference between the extent of a state's jurisdiction over residents and over non-residents respectively.

Over *residents* the state has plenary power of taxation. It can impose a general tax on residents based on their ability to contribute to the support of the government.

> *Kirtland* v. *Hotchkiss,* 100 U. S., 491, 499.
> *Hawley* v. *Malden,* 232 U. S., 1, 11.
> *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S., 54.

As was said in the case last cited, at page 58:

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed."

This opinion and the opinion in *Union Transit Co.* v. *Kentucky,* 199 U. S., 194, page 204, clearly show that the limitation preventing the state from imposing a property tax on tangible property physically situated without the state does not apply to a tax imposed on a resident and measured by his income.

Over *non-residents,* on the other hand, the state has no such general power of taxation. *State Tax on Foreign-held Bonds,* 15 Wall, 300.

That a state has power to impose a special income tax on non-residents based on their income

from sources within the state is argued under Point II, *infra*. For the present purpose it is sufficient to point out that a state does not possess over non-residents the same general power of taxation as it has over residents.

It follows that a state having power to impose a general income tax on a resident measured by his income from all sources and to impose on a non-resident only a special income tax, cannot tax them both on the same basis without either assuming to stretch its jurisdiction over non-residents beyond the limits of its power, or else giving up a large part of its legitimate power over residents. The former course would be legally impossible; the latter course would be an uncalled-for abdication of power and surrender of needed revenues, especially in the case of a creditor state like New York.

Professor Seligman says, in the article above referred to, at pages 46 and 47:

> "In the first place, the income tax might be regarded as a combination of special income taxes and everybody, resident and non-resident alike, might be taxed only upon that part of his income received from sources within the state. * * *
>
> "* * * this solution, however acceptable in a debtor state like Wisconsin, would be open to the objection adverted to above, that in a financial center like New York the proportion of income received from its inhabitants from sources outside New York forms the overwhelming percentage of the whole. A creditor state like New York would accordingly find such a solution fiscally inadmissible. The revenue which it would receive from the taxpayers would be insignificant when compared

with the expenditures which it would be called upon to incur because of their presence within its borders. * * * We must, in a general income tax, bear in mind not alone income earned but income spent—not only the production side, but the consumption side of ability to pay. The Wisconsin principle is as defective in principle as it would in New York be hopeless in practice."

The State of New York was therefore compelled by the limits on its own jurisdiction to establish a different measure of tax over residents and over non-residents.

3. The difference in the base of the tax, being forced upon the state by reason of its limited jurisdiction, cannot be regarded as an arbitrary discrimination.

Directly in point is the decision of this Court in *Maxwell* v. *Bugbee,* 251 U. S., ——, decided October 27, 1919. The Court there overruled the contention that the so-called "ratio provision" of the New Jersey inheritance tax law was invalid because it differentiated between non-resident and resident estates by taxing the former on the transfer of property within the state at a rate based on the value of the entire estate within and without the state, whereas resident estates were taxed at a rate based only on the value of the property actually subject to the tax. The Court upheld the broad power of the state to make distinctions between different classes of cases, saying:

> "In making classification, which has been uniformly held to be within the power of the State, inequalities necessarily arise, for some

classes are reached, and others omitted, but this has never been held to render such statutes unconstitutional. *Beers* v. *Glynn,* 211 U. S., 477. This principle has been recognized in a series of cases in this court. *Board of Education* v. *Illinois,* 203 U. S., 553; *Campbell* v. *California,* 200 U. S., 87; *Keeney* v. *Comptroller of the State of New York,* 222 U. S., 525. It has been uniformly held that the Fourteenth Amendment does not deprive the States of the right to determine the limitations and restrictions upon the right to inherit property, but 'at most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, which would be so obviously arbitrary and unwarrantable as to be beyond the pale of governmental authority.' *Campbell* v. *California,* 200 U. S., 95."

The Court quotes the following from the opinion in *Keeney* v. *Comptroller of New York,* 222 U. S., 525, 535:

> "The validity of the tax must be determined by the laws of New York. The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard upon all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch* v. *Reardon,* 204 U. S., 152, 159), that it must tax all transfers, or that all must be treated alike."

This Court then continues (*Maxwell* v. *Bugbee*. 251 U. S., ——):

> "In order to invalidate this tax it must be held that the difference in the manner of

assessing transmission of property by testators or intestates, as between residents and non-resident decedents, is so wholly arbitrary and unreasonable as to be beyond the legitimate authority of the State. We are not prepared so to declare."

The fact that the case cited dealt with an inheritance tax and the instant case is concerned with an income tax makes no difference in the principles involved. The power to tax inheritances, or to tax incomes, or any other subject of taxation being once established, the Fourteenth Amendment restricts the state's power of classification only to the extent of preventing such discriminations "as would exclude the conception of judgment and discretion, which would be so obviously arbitrary and unwarrantable as to be beyond the pale of governmental authority."

This Court held in *Maxwell* v. *Bugbee, supra,* that a difference in the measure of the tax based on the difference in jurisdiction over residents and non-residents cannot be considered such an arbitrary and unreasonable discrimination:

> "The resident testator or intestate stands in a different relation to the State than does the non-resident. The resident's property is usually within the ready control of the State, and easily open to inspection and discovery for taxation purposes, by means quite different from those afforded in cases of local holdings of non-resident testators or intestates. As to the resident, his entire intangible, and usually most of his tangible property, pay tribute to the State when transferred by will or intestacy; the transfer of the non-resident's estate is taxed only so far as his estate is located within the jurisdiction and only so far as it

> comes within the description of 'real property within this State, or of goods, wares, and merchandise within this State, or of shares of stock of corporations of this State, or of national banking associations located in this State.' * * *
>
> In our opinion there are substantial differences which within the rules settled by this Court permit the classification which has been accomplished by this statute."

This ruling operates just as directly to sustain the distinction made by the New York law between the general income tax on residents and the special income tax on non-residents as it did to sustain the precisely similar distinction made by the New Jersey law between a general inheritance tax on resident estates and a special inheritance tax on the transfer of property within the state of non-resident estates. It merely applies the principle that the difference in the jurisdiction of a state over residents and non-residents is a legitimate basis for classification, distinguishing between them in respect to taxation as in other subjects of legislation. That principle has been applied in a number of other cases cited at pages 21 and 22 of appellee's brief and was thus expressed in *District of Columbia* v. *Brooke,* 214 U. S., 138, 150:

> "The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and

not the other, important differences immediately appear."

To hold otherwise in a case like this would, it is submitted, be contrary to reason and common sense. It is only arbitrary and unreasonable discriminations that are forbidden. Such was the discrimination held invalid in *Chalker* v. *Birmingham & Northwestern Railway Co.*, 249 U. S., 522, where a license tax was imposed on construction companies of $25 if they had their chief office within the State and $100 if they had their chief office outside the State. This was held to be an arbitrary and unreasonable discrimination against foreign construction companies, and it was clearly so, because there was no valid reason for varying the amount of the tax according to the location of the principal office. The principle applied in that case, however, can apply only to discriminations intentionally adopted by the voluntary and arbitrary act of the State. But the difference in jurisdiction between residents and non-residents is a distinction forced on the State by the limitations of its very existence as a State; the State must submit to the distinction and to its consequences, whether it will or not. To say that a distinction which is thus forced upon the State constitutes a voluntary and arbitrary discrimination on its part is a plain contradiction in terms.

It follows that the difference in the base of the tax between residents and non-residents does not constitute an unconstitutional discrimination.

4. The difference in the exemptions and deductions granted to residents and non-residents corresponds to and bears a reasonable relation to the difference in the base of the tax.

As between the resident who is taxed on his entire income and the non-resident who is taxed only on his income from sources within the State, it would seem manifestly unfair that the non-resident paying the lesser tax should have the same exemptions and deductions as the resident.

The legislature of New York has adopted the principle that the non-resident should be allowed only such exemptions and deductions as correspond to the smaller base of the tax to which he is subject. The question here is whether that principle or its application is "so obviously arbitrary and unwarrantable as to be beyond the pale of governmental authority."

The differences complained of are of two kinds:

(a) The "personal exemption" and the exemption for dependents granted by Section 362. This is apparently granted on the theory of exempting from the tax on a person's *entire* income so much thereof as represents a minimum of subsistence. As it is only the resident who is taxed on his entire income, this minimum is deducted only from that income. The non-resident is not taxed on his entire income and consequently is not allowed this personal exemption. But he has, instead, an exemption not granted to the resident, of his entire income other than from sources from within the State. The fact that this exemption is enjoyed by him as of right and is not voluntarily granted to

him by the State does not alter the fact that the difference exists and is the occasion for the refusal of the personal exemption. The non-resident has, in addition, another exemption which is voluntarily granted to him by the State. If the State of his domicile taxes him on his entire net income (in which case that State may be expected to permit him a personal exemption corresponding to that granted by New York to its residents) the State of New York grants him in addition a credit against his tax payable to the State of New York of such proportion of the tax payable to his home State as is levied on his income taxable in New York (Section 363).

(b) The deductions granted by Section 360 are granted to residents irrespective of the sources of income to which they relate because the resident is taxed on his income from all sources; whereas a non-resident who pays tax only on income from sources within the State is allowed only such deductions as are connected with the income on which he is taxable.

The exemptions and deductions are both allowed with a view to the difference in the base of the tax so as to equalize, so far as is possible by a general rule, the relative positions of the non-resident and the resident.

The differences in question bear a direct and reasonable relation to the different situation of residents as compared with non-residents, as regards the jurisdiction of the State in relation to the tax. The legislative theory as outlined above is certainly not " such an exercise of power as would exclude the conception of judgment and discretion, which would be so obviously arbitrary and unwar-

rantable as to be beyond the pale of governmental authority."

It would seem elementary that where two classes of taxpayers are taxed on a different base there may legitimately be a difference in the exemptions and deductions allowed them.

A case directly in point is *Travelers Insurance Co.* v. *Connecticut,* 185 U. S., 364, where this Court upheld a statute of the State of Connecticut which taxed resident stockholders of corporations at the local rate for personal property tax and non-resident stockholders at a fixed rate, and at the same time allowed to resident stockholders, but not to non-resident stockholders, a deduction of so much of the value of their stock as was represented by real estate of the corporation taxable locally. A fuller analysis of the case with citations from the opinion may be found in pages 41 to 44 of appellant's brief.

Directly in point also is *Maxwell* v. *Bugbee,* 251 U. S., *supra,* sustaining the "ratio provision" of the New Jersey inheritance tax law, whereby non-resident estates taxable only on the transfer of property within the state are required to pay at graduated rates based on the value of the entire estate within and without the jurisdiction, while resident estates taxable on the transfer of the whole estate pay at rates based only on the value of the property subject to the jurisdiction.

The principle upon which a non-resident taxable only on his income from sources within the state is not granted the same exemptions and deductions as are allowed to a resident taxable on his entire net income is substantially the same as the principle on which the New York law makes an analogous

distinction in the taxation of personal property. A resident taxable on his entire personal property (excepting tangible property having an actual physical situs elsewhere) is allowed to deduct his just debts (Tax Law, Sections 8, 6); the non-resident taxable only on his capital invested in business in the state and on his tangible property located there (Section 7) is not allowed to deduct his debts. The reasons for this distinction were thus explained by Peckham, J., in *People ex rel. Thurber Whyland Company* v. *Barker,* 141 N. Y., 118, at page 122:

> "The foreign corporation is not to be taxed in all things the same as if it were a resident, because the statute expressly provides that it is only to be taxed for the sum invested in business in this state, and in order to tax it upon that sum no indebtedness should be allowed. The percentage, the form, the mode of the assessment and taxation upon the specific sum invested in business in this state are to be the same as if the person were a resident, but inasmuch as all the subjects of assessment against a non-resident are not within the jurisdiction of the state, but only the sum here invested, it is plain that it was never contemplated by the legislature that such non-resident should have the right to make deductions from that sum by reason of debts, while the taxing authorities would have no right to balance such deductions by an assessment of other property of the non-resident not situated within the state. The resident has no right to deduct his indebtedness from any specific piece of personal property, or from any special chose in action. In a general way it may be said that he is to be charged with all his personal property, and from that total he may deduct his debts. This cannot be done in

the case of a non-resident, although it may (as we may assume) be done at his domicile. All we are to do is to assess and tax the sum here invested, and the equities must, as we have said, be adjusted at the domicile of the person."

The rule laid down in the case last cited was amplified in *People ex rel. Hecker-Jones-Jewell Milling Company* v. *Barker,* 147 N. Y., 31 by permitting a non-resident to deduct from his taxable property within the state indebtedness incurred in the purchase of that property. The distinction between general deductions from a general tax and specific deductions from a special tax was thus explained by Peckham, J., at pages 41, 42:

"This treatment of the question is not in fact to be regarded in the light of a strict deduction of debts from assets; it is construing the meaning of the statute and determining what in reality is the sum invested by a non-resident individual or corporation under these circumstances, in the business in which he or it is engaged in this state. It is not adjusting the equities as spoken of in the *Thurber-Whyland* case, which we then held should be done at the place where the corporation was a resident. It is a different thing from ascertaining the general and gross assets of a non-resident to be found within the state, and from that sum deducting all its debts whenever and upon whatever cause incurred. The non-resident corporation investing a sum of money in this state is to be assessed for the full sum it invests here, although it may owe debts enough outside of such investment to render it insolvent. The indebtedness it has incurred in the transaction from which the purchase of the property is the result, is no part of the sum it has invested in such purchase and no assessment can be made which includes the amount of that indebtedness."

The distinction now complained of between residents and non-residents in the taxation of incomes is substantially the same distinction which the settled practice in the State of New York makes in the taxation of personal property. The statute taxing personal property has been on the statute books since 1855 at least and has thus been in force for a period of upwards of sixty years. No question appears ever to have been raised as to its validity. A holding that the same distinction made with reference to income tax is invalid would not only be contrary to the decisions of this Court cited above, but would apparently operate to invalidate the New York law taxing personal property.

Under the foregoing principles, it is submitted that the distinction made by the statute between residents and non-residents is a legitimate distinction which should be upheld as well within the state's power of classification.

This would be so even if, in fact, it operated to the disadvantage of non-residents. In fact, however, we contend that non-residents as a class are not discriminated against, but that whatever disadvantage may result to an individual non-resident in any particular case is due to his particular situation and not to any discrimination against non-residents as a class.

5. The statute does not in fact discriminate against non-residents as a class.

The statute contemplates that a resident shall be taxed on his entire net income after allowing the general deductions and the personal exemption.

He will then in the ordinary case still pay a larger tax than the non-resident who does not pay tax on his entire income, but only on income from sources within the state, excluding his income from the whole class of intangible property enumerated in Section 359, subdivision 3, even though within the state, who is allowed to deduct all losses of property within the state (Section 360, subdivision 5) and all deductions connected with income from sources within the state (Section 350, subdivision 11), and who in addition receives a credit of a proportionate share of any income tax payable at his domicile (Section 363).

The purpose and operation of the credit given by Section 363 are thus set forth in Professor Seligman's article above referred to at pages 47, 48:

> "We are led, therefore, to the remaining solution as the only possible one, namely, to subject residents to a general income tax on their entire income, from whatever source derived and to subject non-residents to the special income taxes; that is, to arrange that non-residents should be liable only on such income from special sources as is received or earned within the state.
>
> "This solution, satisfactory as far as it goes, is open to the criticism that if two states impose a similar tax and follow the same principle they may create cases of unjust double taxation by superimposing in practice special income taxes upon a general income tax. For if individual A earns his money and spends it in one state he would be taxed only once on his entire income; while B, with the same income, who earns his money in one state and has his legal residence in another, will be taxed twice, once by the state where the income is earned and again by his state of residence.

"A simple escape from this difficulty can, however, be found in a provision whereby the state where the income is earned permits the non-resident to make a proportionate deduction of such tax on the income earned within the state from the tax, if any, which may be levied by the state of residence. This was the solution suggested by the present writer and adopted in the New York law. The working out of the system in practice would then be as follows: If, in the first place, New Jersey, for instance, imposed no income tax, the Jerseyite would be subject to taxation in New York on his income earned within the state. To this special income tax there can surely be no objection. For if the tax be regarded as a general income tax New York is assuredly justified in seeking to reach the privilege side of the Jerseyite's taxable ability; if New Jersey elects not to attempt to reach the sacrifice side of his taxable ability, that is its own concern. But if the tax be regarded, as is more properly the case, as a special income tax on the non-resident, the defence of the solution is even stronger."

In *Travelers Insurance Co.* v. *Connecticut,* supra, this Court, in refusing to hold invalid a discrimination against non-residents in the Connecticut law taxing shares of stock in corporations, considered the system of taxation of Connecticut, and found that residents were in certain respects under a disadvantage as compared with non-residents, and held that the entire situation was for the consideration of the Connecticut legislature, with whose solution of the problem the Court could not interfere.

Under the system of taxation in New York the resident, as compared with the non-resident, labors under even greater disadvantages than those

found in the case cited to exist in Connecticut. To refer again to some of the respects in which the resident is at a disadvantage:

The resident is taxed on his entire income, whereas the non-resident is taxed only on his income from property and business within the state. (Section 351.)

The resident is taxed on the income from all his intangible property, whereas the non-resident is exempt, even with respect to his intangible property within the State. (Section 359, subdivision 3.)

The resident pays the full tax without deduction for taxes payable to other jurisdictions, whereas the non-resident has a credit for taxes paid at his domicile if his home jurisdiction allows a similar credit to residents of New York. (Section 363.)

The resident is subject to personal property tax on all his tangible personal property located within the state (Tax Law, Section 8), whereas the non-resident is taxable only on his tangible property located within the state (Tax Law, Section 7, subdivision 2) and such tax is a tax *in rem* and not in *personam* (*City of New York* v. *McLean,* 170 N. Y., 374; *Matter of Maltbie* v. *Lobsitz,* 223 N. Y., 227) and hence unenforceable by suit against non-residents.

The resident is subject to personal property tax on all his intangible property from which no income, subject to the income tax, is derived (tax law, Sections 8, 352), whereas the non-resident is exempted from all taxation on intangible property whether having a situs within the state or not (except as to capital invested in business in the state, Section 7, subdivision 1).

Taking the law as a whole, the balance of advantage is all in favor of the non-resident. Whatever

hardship there may be in the case of individual non-residents arises from the personal situation of the individuals concerned and not from any hostility to or discrimination against non-residents as a class.

On the other hand, to allow to non-residents taxable on a smaller basis the same exemptions and deductions as are allowed to residents taxable on their entire income would constitute a discrimination against residents.

6. Possible hardship in individual cases is not sufficient ground for invalidating the statute.

Cases may concededly be imagined where the refusal to allow a non-resident the same exemption and deductions as are allowed to residents may work a hardship. It is suggested, for example, that a resident of New Jersey may have no income other than a salary of $1,000 earned in New York, which, in the case of a resident of New York, would be exempt from taxation because not in excess of the personal exemption, but on which the resident of New Jersey will be required to pay a tax of $10. Aside from the fact that the hardship is a slight one, the tax on the smaller incomes being only at the rate of 1%, it is due to the situation of the particular individual. If the same individual had income from other sources outside of the State of New York or from securities within the State of New York, he would pay less than a resident in the same situation.

It is well established that differences and even hardships arising from the particular circumstances of an individual taxpayer do not invalidate a law,

for otherwise no law would be valid, since absolute equality in taxation is unattainable.

In *Henderson Bridge Co.* v. *Henderson City*, 173 U. S., 592, the Court said, at page 616:

> " In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government."

As was said in *Travelers Insurance Co.* v. *Connecticut*, 185 U. S., 364, at page 369:

> " You cannot put one resident against one non-resident stockholder and by a comparison of their different burdens determine the validity of the legislation any more than you can place a stockholder resident in one municipality over against a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders."

In *Maxwell* v. *Bugbee*, 251 U. S., *supra*, the rule was stated thus:

> " The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and

incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."

7. In the last analysis the objection is really to the policy of the law, a question for the legislature and not for the courts.

We submit that plaintiff below has failed to sustain the burden resting upon it of showing affirmatively that the Act in fact discriminates arbitrarily against non-residents as a class (*Amoskeag Savings Bank* v. *Purdy,* 231 U. S., 373, 393.)

Underlying the whole argument in opposition to the law runs the idea that an income tax against non-residents, especially the present law, is unsound in theory and not good policy. The question of policy, however, as this Court has repeatedly held, is for the legislature to determine and not one for decision by the courts. This Court said, in *Travelers Insurance Co.* v. *Connecticut,* 185 U. S., 364, at page 371:

> "But further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents."

And in *District of Columbia* v. *Brooke,* 214 U. S., 138, it was said at page 150:

> " The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws (*Billings* v. *Illinois,* 188 U. S., 97; *Health & M. Mfg. Co.* v. *Worst,* 207 U. S., 338)."

In *Flint* v. *Stone Tracy Co.,* 220 U. S., 107, it was said at page 169:

> " The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice."

In *La Tourette* v. *McMaster,* 248 U. S., 465, it was said at page 468:

> " ' But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise.' It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S., 342, 365, 366, and cases cited; also *Bunting* v. *Oregon,* 243 U. S., 426, 437."

A statute cannot be declared invalid on any such general grounds, but only if the party attacking it shows that it transgresses, to his injury, specific constitutional inhibitions set out in the record. (*Southern Railway Co.* v. *King,* 217 U. S., 524, 534; *Louisville & Nashville R. R. Co.* v. *Finn,* 235 U. S., 601, 610.

No question as to the operation of the statute in particular cases to which it may or may not be applicable is presented by the record; plaintiff's attack and the injunction appealed from are directed against the withholding by plaintiff of tax from *any* of plaintiff's non-resident employees without distinction as to the character of their employment or the nature or extent of their services, the income from which is taxable under the Act. It cannot be assumed that the Act will be enforced in such manner as to operate in violation of plaintiff's constitutional rights; any such possible violation can be passed on only when specially brought to the attention of the Court (*Hatch* v. *Reardon,* 204 U. S., p. 160, 161).

POINT II.

The statute does not exceed the power of the State over non-residents.

The objection, so far as the Fourteenth Amendment is concerned, reduces itself to this: that the State of New York has no power to tax non-residents with respect to their incomes from property and business within the State. The objection will be readily answered by reference to elementary and well settled principles.

1. The taxing power of a State extends over all persons, property and business within its jurisdiction.

In *Lane County* v. *Oregon*, 7 Wall., 71, at pages 76 and 77, the Court said:

> "Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function. * * * The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national govern-

ment. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress."

This power is not subject to Federal control or supervision. As was said in *Michigan Central Railroad Co.* v. *Powers,* 201 U. S., 245, at page 293:

> "We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and, in respect to the latter, the state has, speaking generally, the freedom of a sovereign, both as to objects and methods."

2. The power of a State to tax non-residents on their property and business within the State is so well settled as not to require extended argument.

New Orleans v. *Stempel,* 175 U. S., 309, and cases cited.

Armour Packing Co. v. *Lacy,* 200 U. S., 226.

Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S., 395.

Buck v. *Beach,* 206 U. S., 392, and cases cited.

Liverpool, etc., Ins. Co. v. *Board of Assessors of New Orleans,* 221 U. S., 346.

Armour & Co. v. *Virginia,* 246 U. S., 1.

American Mfg. Co. v. *St. Louis,* 250 U. S., 459, 463.

Appellee's argument that jurisdiction to tax non-residents extends only over specific property found within the jurisdiction runs counter to the well-settled rule that a state has power to tax all property and business within its jurisdiction and seeks to abridge the sovereign power of a state over all business and acts within its jurisdiction. No such limitation on the right to tax business within the state has ever been recognized. In *Pollock* v. *Farmers Loan and Trust Co.,* 158 U. S., pp. 635, 637, this Court clearly recognized a tax "on gains or profits from business, privileges or employments," as being in the nature of an "excise tax on business, privileges, employments and vocations." No authority exists, so far as we are aware, for any distinction with respect to jurisdiction between a business carried on by the aid of capital consisting of specific property within the state, and a vocation, employment or occupation carried on within the state by the rendition of personal services for the taxpayer's own account or on a salary for others. On the contrary, a tax on the sale of sewing machines by itinerant vendors was sustained in *Singer Sewing Machine Co.* v. *Burchell,* 233 U. S., 304, and a tax on transfers of shares of stock in *Hatch* v. *Reardon,* 204 U. S., 152, 159.

The argument that because the state cannot prohibit a non-resident from pursuing his vocation within the state it cannot tax him on his profits therefrom would destroy the power to impose occupation taxes altogether; as was said in *Hatch* v. *Reardon,* 204 U. S., 152, 162, "A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one."

3. Power to tax income from property or business follows from the power to tax property or business.

This proposition would seem self-evident. An income tax is not different in its nature from other taxes. It is a tax, the amount of which is measured by income instead of by capital values, or in some other way.

> "In a broad sense an income tax is a tax the amount of which is determined with reference to the income of the taxpayer." *Kennan, Income Taxation*, 9.

It would seem almost to require no argument that a State which has power to impose a personal tax can establish as a measure of the tax the taxpayer's income and that a State having power to tax property or business can measure the tax by the income from the property or the business. This proposition has uniformly been recognized as true and has never, so far as we are aware, been seriously questioned. Merely to state the argument that a State may tax property according to its capital value but not according to its income; that it may tax business according to its capital value or by arbitrary license fee but not in proportion to the income derived therefrom, is enough to show its fallacy.

The jurisdiction over non-residents asserted in the present statute is quite moderate in extent. The State of New York does not attempt to tax the income from the credits or securities of non-residents within the State, which it was held might be reached by a property tax in *New Orleans v. Stempel*, 175 U. S., 309, and cases there cited. It

does not undertake to measure the tax in proportion to the non-resident's entire income—a method which might have been warranted under the decision of this Court in *Maxwell v. Bugbee,* 251 U. S., ——, decided October 27, 1919. It undertakes to reach only the income of non-residents from property and from business within the State and uses as the measure of the tax only the income from such property and business, subject to deductions connected therewith and with a credit on account of taxes thereon imposed by the State of the taxpayer's domicile.

So moderate an exercise of jurisdiction is, we submit, not open to serious question.

A state having jurisdiction to impose a tax may adopt any method of arriving at the amount of the tax and unless the measure adopted is utterly arbitrary and unreasonable, it is not open to question in the courts.

In *Society for Savings* v. *Coite,* 6 Wall., 594, the Court upheld a tax on banks measured by the amount of their deposits on a given day, saying, at page 608:

> "Different modes of taxation are adopted in different States, and even in the same States at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets, or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period.
>
> Experience shows that the latter mode is better calculated to effect justice among the cor-

porations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained."

In *Kirtland* v. *Hotchkiss*, 100 U. S. 491, the Court said at page 499:

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal Government cannot rightly interfere."

In *Maine* v. *Grand Trunk Railway Co.*, 142 U. S., 217, the Court sustained a State excise tax on a railroad company measured by a percentage on its gross receipts. The Court said, at page 228:

"The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be

eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

In *Metropolitan Life Insurance Co.* v. *New Orleans*, 205 U. S., 395, the Court sustained a tax on business done by a foreign insurance company within the State measured by the amount of its loans to resident policy holders. That decision was followed in *Liverpool etc., Ins. Co.* v. *Orleans Assessors*, 221 U. S., 346, 356, 357, sustaining a similar tax measured by the amount of premiums due to a foreign insurance company from resident policy holders.

This Court said in *Fidelity and Columbia Trust Co.* v. *Louisville*, 245 U. S., 54, 58:

> "Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State."

And the following is from the opinion of the Court in *American Manufacturing Co.* v. *St. Louis*, 250 U. S., 459, 463, sustaining a State excise tax on the manufacturing business done within the State by a non-resident corporation measured by the sales of goods so manufactured:

> "There is no doubt of the power of the State, of the City, acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing

business in the city. Unless some particular interference with Federal right be shown, the states are free to lay privilege and occupation taxes. *Clark* v. *Titusville,* 184 U. S., 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *St. Louis* v. *United R. Co.,* 210 U. S., 266, 276, 52 L. ed., 1054, 1058, 28 Sup. Ct. Rep., 630.

The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market."

Income has long been regarded as a fair measure of a tax on property and business.

The following is from the opinion of Field, J., in *State Tax on Foreign-held Bonds,* 15 Wall, 300, at page 319:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, *or its use, or its capacity, or its productiveness.* It may touch

business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

In *Scholey* v. *Rew,* 23 Wall., 331, this Court said, at page 348:

> "Exactions for the support of the government may assume the form of duties, imposts, or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of capital stock or to the business done or profits earned by the individual or corporation."

In *Michigan Central R. R. Co.* v. *Collector,* 100 U. S., 595, the following was said at page 599, regarding a Federal excise tax on railroad companies:

> "The tax is laid by Congress on the net earnings, which are the results of the business of the corporation, on which Congress had clearly a right to lay it."

In *Spreckles Sugar Refining Co.* v. *McClain,* 192 U. S., 397, the Court said, at page 411, discussing a Federal excise tax on corporations engaged in the business of refining petroleum or sugar:

> "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded

because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

In *Flint* v. *Stone Tracy Co.*, 220 U. S., 106, this Court said, discussing the Federal Income tax, at pages 146, 165:

> "This tax, it is expressly stated, is to be equivalent to 1 per centum of the entire net income over and above $5,000 received from *all sources* during the year—this is the measure of the tax explicitly adopted by the statute. * * * In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. * * * It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations."

See also *United States Express Co.* v. *Minnesota*, 223 U. S., 335, 343, 345, reviewing this and other cases.

The Federal excise tax on corporations, under the Act of August 5, 1909, was described in *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 183, as intended "not to tax property as such, or the mere conversion of property, but to tax the conduct of

the business of corporations organized for profit, by a measure based upon the gainful returns from their business operations and property from the time the Act took effect."

From the rule established by numerous decisions that a jurisdiction having no power to tax property cannot tax the income therefrom, the converse proposition would seem to follow, that power to tax income from property exists whenever there is jurisdiction to tax the property. The decisions on this subject are summarized in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 429, at pages 581, 582, as follows:

> "In *Weston* v. *Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the City of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the Court, Chief Justice Marshall delivering the opinion, overruled that contention.
>
> So in *Dobbins* v. *Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.
>
> In *Almy* v. *California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 *Wall.*, 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the amount of sales

of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S., 326, and *Leloup* v. *Mobile,* 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized."

In the *Pollock* case the Court held that the income tax was a direct tax upon the property from which the income was derived and also held that a tax upon the income of municipal bonds was invalid for the further reason that such bonds were beyond the taxing power of the Federal Government. In this last holding the Court was unanimous, White, J., saying in his dissenting opinion at page 652:

> "In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the Federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed."

and the following is from the dissenting opinion of Harlan, J., at page 653:

> "While property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defense and the general welfare of the United States, the instrumentalities employed by the States

in execution of their powers are not subjects of taxation by the general government, any more than the instrumentalities of the United States are the subjects of taxation by the States."

Pertinent, also, is the citation from Alexander Hamilton, contained in the opinion of this Court on the rehearing in the same case, 158 U. S., 625, 626:

> "A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton in his report on the public credit, in referring to contracts with citizens of a foreign country, said: 'This principle, which seems critically correct, would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases indeed, the *income* or *annuity* is the property itself.' 3 Hamilton's Works, 34."

The rule laid down in these cases that the power to tax incomes depends upon power to tax the source of the income and that therefore in the absence of power to tax the source there is no power to tax the income therefrom, would seem to lead to the corollary that power to tax the source of the income carries with it power to tax the income therefrom.

This principle has been applied in decisions sustaining state income tax laws, all of which rest the jurisdiction of the state on its jurisdiction over

the person earning the income or the property or business from which the income proceeds.

> *State* ex rel. *Manitowoc Gas Co.* v. *Wisc. Tax Comm.*, 161 Wis., 111.
> *U. S. Glue Co.* v. *Oak Creek*, 161 Wis., 211; affirmed, 247 U. S., 321.
> *Bayfield Co.* v. *Pishon*, 162 Wis., 466.
> *Maguire v. Tax Commissioner*, 230 Mass., 503.
> *Commonwealth* v. *Werth*, 116 Va., 604.
> *Shaffer* v. *Howard*, 250 Fed., 873.

The present statute shows throughout careful recognition of the fact that power to tax income depends on power to tax the source of the income. In addition to the exemption of all income of non-residents not derived from property or business within the State, it exempts interest on the obligations of the United States and the compensation of officers and employees of the United States. (Sec. 359, 2, d. & f.)

4. The validity of the act depends not upon the theoretical nature of the tax but upon its practical operation and effect.

In many of these cases there is considerable discussion of the nature and characteristics of an income tax. The requirement of the Federal constitution for the apportionment of direct taxes, and the provisions of State constitutions requiring uniformity of taxation and establishing other limitations with reference to property taxes or

other specified kinds of taxes, have led to much argument as to the applicability of the particular provision in question to an income tax. These questions have occasioned much refinement of reasoning as to whether an income tax was a direct tax or an indirect tax; a personal tax or a tax in rem; a property tax, an excise tax or a privilege tax, and so on. These discussions, however relevant to the application of specific constitutional or statutory requirements governing a particular kind of tax, have no bearing on the question of jurisdiction.

The jurisdiction of a State to impose upon a non-resident a tax measured by his income from his property and business within the State depends on the fact that he owns the property or carries on the business within the State, irrespective of the theoretical classification of the tax. If the income tax be regarded as a property tax, it is imposed because the property is within the jurisdiction. If it is an occupation tax or an excise tax or a privilege tax, it is levied because the business is carried on within the jurisdiction. If it be regarded as a personal tax, the non-resident, to the extent to which he comes within the State and owns property and carries on business there, submits himself to its jurisdiction.

Appellee's argument throughout assumes that in order to sustain a tax its specific theoretical character must be ascertained and determined to come within the class of taxes which states have been accustomed to lay, in effect preventing a State from devising new kinds of taxes; whereas the established principle is that with respect to persons, property or business within its jurisdiction a State has sovereign power to lay such

taxes as it sees fit, whether new or old in kind, subject to being set aside only if they violate some constitutional limitation.

The argument that the tax depends on the supposed situs of an income as an independent thing overlooks the fact that the income is used as a mere measure of the tax.

The argument that the tax against non-residents is invalid because it is a tax on the person of the non-resident rather than a tax against him with respect to his property or business within the State, is unsound, we submit, for two reasons: first, it assumes that because the tax on the entire income of a resident is a tax on the resident personally, therefore the tax on the non-resident's income from property or business within the State is likewise a tax on the non-resident personally, thus ignoring the distinction between a general income tax and a special income tax discussed under Point I, *supra;* second, it assumes that because a state has no general jurisdiction over the person of a non-resident it cannot assume jurisdiction over him to the extent to which he comes into the State and does business there.

As was said in *Tappan v. Merchants National* Bank, 19 Wall., 490, 499, 503:

> "The power of taxation by any State is limited to persons, property, or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this

court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property. * * * It must be borne in mind that all this property, intangible though it may be, is within the State. That which belongs to non-residents is there by operation of law. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the State and they must obey its will when kept within the limits of constitutional power."

See also *Corry* v. *Baltimore*, 196 U. S., 475.

The jurisdiction of a State depends not on metaphysical niceties, but on the actual facts of power and control. When a resident of New Jersey is arrested for violating traffic regulations in driving his automobile in the streets of the City of New York, the power to punish him does not depend on the answer to the question whether the traffic regulation was directed in rem against his automobile, or personally against him, or merely operated on his act in driving the automobile. The jurisdiction rests on the fact that he was driving an automobile in the streets of New York and was subject to its laws. And so, when a resident of New Jersey or Connecticut owns property or transacts business in New York, New York has power to tax him on the income derived therefrom, and no question of abstract theory should allow him to escape his share of the burdens borne by other property and business within the State. State courts may determine for themselves the precise nature of the tax as determined by local constitutional or statutory provisions. This Court concerns itself

only with the fact of jurisdiction arising from control over the source of the income taxed. It has repeatedly held that jurisdiction depends not on the name or theoretical nature of the tax, but on its practical effect. In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S., 688, 696, 697, the Court said:

> "Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S., 439, 445."

In *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S., 185, 225, the Court said:

> "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

In *Knowlton* v. *Moore*, 178 U. S., 41, 82, 83, in quoting from *Nicol* v. *Ames*, 173 U. S., 509, the Court said:

" 'The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

" 'In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economical or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged in as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity, a tax should be regarded in its actual practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.' "

In *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S., 54, the Court said, at page 59:

> "It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone Tracy Co.*, 220 U. S., 107, 146, 162, *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

And in *American Manufacturing Co.* v. *St. Louis*, 250 U. S., 459, 462, 463, the Court said:

> "But, as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the state court, but upon its practical operation and effect. *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U. S., 350, 362; *Mountain Timber Co.* v. *Washington*, 243 U. S., 219, 237; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S., 292, 294."

Nor does the possibility of double taxation invalidate a law.

As this Court said in *Kidd* v. *Alabama*, 188 U. S., 730, 732:

> "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The decision last cited was followed in *Hawley* v. *Malden*, 232 U. S., 1.

5. The practical effect of denying or unduly limiting the power of a State to tax non-residents would be a serious impairment of that power of taxation which is essential to sovereignty.

Such a holding would be especially disastrous to a state like New York, having a large number of non-residents within its borders owning property and doing business under the protection of the State, who should not be allowed to escape their fair share of the burdens of taxation, leaving the entire burden to fall upon the residents of the State.

This situation is depicted in Professor Seligman's article above referred to as follows, at p. 41:

> " In many of the less advanced states of the union, the great majority of incomes within the state are earned by residents of the state; that is to say, there are comparatively few non-residents who sojourn for a protracted period within the state. And, on the other hand, most of the residents of the state secure all or a very large part of their revenue from property situated or business conducted without the state. In New York, however, the situation is very different. In the first place, New York City, as the great metropolitan center, attracts people from all over the country. Not only do they swarm to New York for weeks or months at a time, but a large number of wealthy individuals, who still retain their legal residence in other states, erect princely mansions in New York and live there most of the year. On the other hand, New York City is the financial center of the country; we know that more than one-third of the individual income tax of the entire country is paid in New York. That means that the wealthy residents of New York

own a large part of the property of the nation and that the incomes received in New York are to a considerable extent received from sources outside of the state. Finally, New York, as the industrial center of the country, is crowded with hundreds of thousands of members of the professional classes and of wage-earners who get their living in the city but who commute to the suburbs. Northern New Jersey and, to a less extent, southwestern Connecticut, are nothing but suburbs of New York.

Thus from both points of view the question of double taxation, *i. e.*, the taxation of non-residents on income received within the state and of residents on incomes received without the state, assumes in New York a significance which in practice far transcends that in any other part of the country."

The evil which would result from allowing non-residents to escape the tax is thus stated in the same article at page 47:

"This solution of the problem would involve the important practical consequence that any New Yorker who desired to escape his taxes could easily do so by transferring his legal residence to his summer home in New Jersey. It is well known that the chief reason why the general property tax has broken down so completely in New York City is the facility afforded to wealthy New Yorkers to claim their legal residence in the environs. The one great advantage of the income tax over the property tax is that it tends to decrease this movement. Such a result, however, would be entirely defeated if non-residents were exempted on their income earned within the State of New York. No solution of the problem which fails to put a stop to this deplorable practice of local expatriation can be acceptable. The exemption

of non-residents from income taxation would fail to cure the existing inequality of the general property tax and would create a new and still more indefensible inequality."

And the unfairness to residents of the State which would take place is thus set forth at page 40:

> "Not only is the method defensible, but for New York to refrain from action would involve an inequality. If two contiguous pieces of land are owned respectively by a New Yorker or a Jerseyite, if two competing business houses are occupied respectively by a New Yorker or a Jerseyite, if two dentists, one a New Yorker and the other a Jerseyite, carry on their professions on opposite sides of the same New York street, is there any reason why, in the absence of any income tax by the State of New Jersey, the Jerseyite should be preferred to the New Yorker? Why should the sources of income within the state be taxable to some and not to others? Far from imposing any additional burden upon the Jerseyite or interfering in any way with interstate commerce, the taxation of the Jerseyite would bring about substantial equality in treatment with that of the New Yorker. To do less than this would give him an unjustifiable preference."

Appellee's contention that non-residents are not subject to the tax, but that the power of the State to lay an income tax depends on the legal domicile of the taxpayer, amounts to a negation of the sovereign power of taxation. For it is elementary that in this country a person has the right to select his domicile and to change it at will. Domicile depends largely on the intention of the individual (*Gilbert* v. *David* 235 U. S., 561, 569, 571). If the power of a State to tax property and busi-

ness within its jurisdiction by the equitable measure of an income tax is made to depend on the voluntary act of each individual taxpayer in deciding upon his legal domicile then the states are indeed reduced to impotence. Taxing power dependent not upon the sovereign will of the state but on the individual will of the persons subject to the tax is a contradiction in terms. A power to tax residents or non-residents according to the state of mind of the individual subject to it is inconceivable.

A similar contention to that of the appellee here was made and overruled in *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S., 185. It was there argued that a corporation domiciled in one state could not be taxed on its business in another, but only on its tangible property there situated. This Court said at page 224:

> "It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was 'Mobilia personam sequuntur,' but that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S., 18, 22. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey."

It would be equally absurd and equally dangerous to hold that a person doing business in New York could avoid being taxed on the income from his property and business in New York by merely moving his domicile across the river to Jersey City.

POINT III.

The withholding provisions of the statute are not unconstitutional.

The power of a state to require information and withholding at the source is sufficiently shown by the authorities cited at pages 55 to 58 of appellant's brief.

The case of *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania,* 153 U. S., 628, 645, 646, relied on by appellee, has no bearing here; in that case the statute was held void expressly because the State of Pennsylvania required a New York Corporation to withhold "*in the state of its creation.*" The opinion of the Court clearly indicates that the power would have been unquestioned if it had operated within the jurisdiction of the State of Pennsylvania. The power of a state to require such withholding by national banks located within the state has been repeatedly upheld. (*First National Bank* v. *Kentucky,* 9 Wall, 353; *Merchants & Manufacturers National Bank* v. *Pennsylvania,* 167 U. S., 461; *Aberdeen Bank* v. *Chehalis County,* 166 U. S., 440, 444 to 446; *Clement National Bank* v. *Vermont,* 231 U. S., 120, 140.)

And in *Hinson* v. *Lott,* 8 Wall., 148, it was held that although the method of collecting a tax was different with respect to property coming from without the state, this was an appropriate and legitimate exercise of the taxing power of the state.

The provision for withholding is an essential method for enforcement of the tax against non-residents and was sustained as such by the Court below.

The power to lay the tax would be of little value

if the state had not the right to enforce it by requiring all persons within its jurisdiction to withhold the tax from salaries paid by them to non-residents. The requirement of withholding is limited to salaries earned within the state by non-residents, which it would be impossible to reach otherwise.

So far as the plaintiff is concerned, the withholding provision is a mere exercise by the state of its power of regulation and control over corporations doing business within its borders, a power that is as extensive over foreign corporations authorized to do business in the state as over domestic corporations (*Orient Insurance Co.* v. *Daggs,* 172 U. S., 557, 566).

Appellee comes within this class. It is alleged in the complaint:

> "Your orator is authorized to transact its business in the State of New York and maintain an office for the transaction of its business in the City of New York, in said State, where it owns and possesses real and personal property. In the conduct of its business your orator employs a large number of persons, many of whom are non-residents of the State of New York as defined in the statute hereto annexed, who are occupied in whole or in part *in the business of your orator within the State of New York.*"

It is not alleged and is not to be assumed that plaintiff will be called upon to withhold or pay any tax otherwise than in the State of New York and in connection with its business actually transacted within the State of New York.

The argument based on the apparent discrepancy between the provision imposing a tax at a grad-

uated scale of one, two and three per cent. (Sec. 351) and the provision requiring the withholding of the tax at the rate of two per cent. (Sec. 366) is, we submit, disposed of by the opinion of the Attorney General of the State printed at pages 62 to 64 of appellant's brief, wherein it is shown that notwithstanding the lack of care with which the statute was hastily amended, the Act, read as a whole, requires withholding only at the rate of tax actually payable. This question of the construction of the statute is a domestic question presenting no federal question; and as the construction placed upon it by the state officials is favorable to the taxpayer, plaintiff has no ground for complaint.

It is respectfully submitted that the judgment of the Court below should be reversed and the case remanded with directions to dismiss the complaint.

Laurence Arnold Tanzer,
William P. Burr,
William S. Rann,
William J. Wallin,
As *amici curiae* on behalf of Conference of Mayors and other City Officials of the State of New York.

No. 548

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

EUGENE M. TRAVIS, as Comptroller of the State of New York,

Appellant,

vs.

YALE & TOWNE MANUFACTURING CO.,

Respondent.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY.

JOHN W. GRIGGS,
Counsel for the State of New Jersey
as *amicus curiae.*

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 548.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Appellant, vs. THE YALE & TOWNE MANUFACTURING COMPANY, Respondent.	On Appeal from the District Court of the United States for the Southern District of New York.

BRIEF OF JOHN W. GRIGGS FOR THE STATE OF NEW JERSEY.

This brief, with the consent of counsel of the respective parties, and by permission of the Court, is filed by me as *amicus curiae* on behalf of the State of New Jersey.

Every working day of the year a great many citizens of New Jersey, numbered by hundreds of thousands, go into the City of New York for the purpose of there transacting business of every kind and carrying on their respective trades and occupations. In this number are embraced officers, clerks and employees of national banks located in the City of New York; officers, clerks and other employees of insurance corporations and manufacturing corporations; bankers, brokers, stenographers, mechanics, telephone operators, telegraph operators, and day laborers.

The State of New York by the statute known as the Income Tax Law of the State of New York, approved May 14, 1919, and printed in the Transcript of Record, seeks to impose upon each and every one of these persons a tax "upon and with respect to the entire net income," as in said act defined. The statute in question will, if enforceable and enforced, affect according to estimates half a million persons, citizens of New Jersey, who carry on business in the State of New York, and the grave concern of the Government of New Jersey in the issue of this case is apparent. The authorities of the State of New Jersey, acting through the Governor of that State, have directed me, on its behalf, to present to the Court their protest against the validity of the statute in question and the reasons why the said statute is unconstitutional and void so far as it affects citizens and residents of the State of New Jersey.

The language of the act imposing the tax is contained in Section 351:

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined, at rates as follows: one per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. *A like tax* is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

The Income Tax Law of the State of New York is unconstitutional and in violation of Article IV, Section 2 of the Constitution of the United States, which provides that,

> **"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."**

And because it violates Section 1 of the Fourteenth Amendment of the Federal Constitution, which provides that,

> **"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."**

No complete definition of the phrase "privileges and immunities" has ever been judicially made, but the declaration of this Court in *Ward* v. *Maryland,* 12 *Wall.,* 418, has been frequently cited as the nearest approach to a full definition of these words and for the purposes of this argument is deemed entirely adequate and sufficient.

The right of citizens of Connecticut and New Jersey to pass into the State of New York and there to engage in lawful trade, business, or manual occupation equally with the citizens of the State of New York is undoubted.

This right is not derived from the Constitution or laws of New York, but from the provisions of the Federal Constitution. The State has no power to grant this right nor to withhold it. The only question in any case is, what privileges and immunities are possessed by the citizens of New York. When that is determined, it follows as a

matter of constitutional right that the same privileges and immunities belong to the citizens of each of the other States of the Union.

Slaughter House Cases, 83 *U. S.*, 36.

Hence it follows that the State of New York has no power to impose a license, privilege or excise tax upon non-residents carrying on any trade, business or occupation within that State, unless a similar license, privilege or excise tax is imposed upon citizens of New York.

The non-resident persons whose income is sought to be taxed, as appears from the bill of complaint in this case, are employees such as are ordinarily engaged in the transaction of the business carried on by the respondent, Yale & Towne Manufacturing Company, and comprise salesmen, clerks, accountants, day laborers, etc. It is not claimed that any license is required from the State of New York to enable them legitimately to carry on their occupations in that State, and no such license is required as to citizens of that State engaged in the same kind of occupations.

New York does not by its statute pretend to confer any privilege, nor does it in any way attempt to make the exercise of an occupation in that State conditional upon payment of the income tax.

The imposition of an income tax, therefore, cannot be sustained legitimately upon any ground of privilege derived from or granted by New York.

If the imposition of the tax cannot be sustained as a privilege tax, upon what basis can it be sustained?

In *M'Culloch* v. *Maryland*, 4 *Wheat.*, 316, it was declared by Chief Justice Marshall, that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation."

And further in the same case it was said:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission."

In the argument of Mr. Attorney General Olney, in *Pollock* v. *Farmers Loan & Trust Co.,* 157 *U. S.,* 429, the essential qualities and character of the tax are properly stated, thus:

> "A tax for the benefit of the public should fall equally upon all persons composing the public, should, as text-writers and judges often express it, be ratable and proportional, and be so adjusted that every member of the community shall contribute his just and equal share toward the common defense and the general welfare."

Taxes are levied upon the residents, inhabitants or citizens of a state or upon property located in the state, for the purpose of defraying the expenses of government. The obligation to support and maintain the government of the state rests upon its citizens and inhabitants. It does not rest upon strangers or casual visitors. Property within a state is taxed because it enjoys the protection afforded by the laws and administration of the state. Citizens of a state are taxed because they enjoy the privileges accorded to them under the constitution and laws of the state and also receive the protection of the state. Citizens of a state are not only charged with the duty of maintaining its government by the payment of taxes, but also by the performance of certain public duties, such as serving on juries, or in the militia, or in public offices. This is because they are "subject to the jurisdiction" of the state.

The status, therefore, of citizens of a state is quite different from that of non-residents, in this and in many other respects. A non-resident, whether engaged in a business or occupation or in passing through a state or temporarily stopping there, is of right entitled to pro-

tection in his person and property, not as a citizen of the state, but as a citizen of another state, under the provisions of the Federal Constitution.

It is obvious, then, that to require a non-resident to pay a contribution toward the expenses of the state in which he happens to earn money, is to require him to pay something which in public policy and according to right and justice he does not owe.

One limitation upon the power of taxation of any state is that such power can be legally exercised only upon the assumption of an equivalent rendered to the taxpayer in the protection of his person or his property.

This limitation is expressed by this Court in *Union Refrigerator Transit Co.* v. *Kentucky,* 199 *U. S.,* 194, as follows:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Co.* v. *Jackson,* 7 *Wall.* 262, 19 *L. Ed.* 88; *State Tax on Foreign Held Bonds,* 15 *Wall.* 300, 21 *L. ed.* 179; *Tappan* v. *Merchants' Nat. Bank,* 19 *Wall.* 490-499, 22 *L. ed.* 189-193; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 *U. S.* 341, 358, 49 *L. ed.* 1077, 1083, 25 *Supr. Ct. Rep.* 669."

The hundreds of thousands of persons who go into the City of New York every working day from Connecticut and New Jersey to engage in useful occupations are not conscious that they do so by the grant of any special privilege from the State of New York, nor are they conscious that they owe to the State of New York any return in money for the privilege of engaging in their occupations in that State. If the subject is looked at from the viewpoint of public interest, it would seem that the contributions and services from this multitude of people to the general business and productiveness to the State of New York would largely outweigh any expenses of police protection afforded them by the municipality of the City of New York.

"The general rule undoubtedly is," says Judge Cooley, in *Cooley's Constitutional Limitations,* page 889,

> "That any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them."

It cannot be doubted that the tax imposed by the statute of New York is a personal tax. It is not on property; it is not an excise or privilege tax, as no privilege is granted. It is a tax on the person carrying on a lawful occupation in New York, and is measured by the amount of his earnings in that State. The income is merely the standard by which the amount of the personal tax is measured. Reduced to "the last analysis," it is an attempt to compel citizens of other States engaged in lawful occupations in New York, which that State can neither license nor prohibit, to contribute to the expenses of administering the government of New York, a State which has no jurisdiction over them, to which they owe no allegiance

nor any support, and from which they receive no benefit or protection except such as the State is bound to give to every one within its borders, whether residents, sojourners or strangers.

The very language of the act indicates that the tax is imposed, not upon property, not upon occupation, not as a privilege, but directly upon the individual; for the law declares, "a tax is hereby imposed *upon every resident* of the State."

The tax in question is not a property tax and has no relation to property as such. Its nature is clearly defined in the case of *Manitowoc Gas Co.* v. *Wisconsin Tax Commission,* 152 *N. W.*, 848, wherein, considering an income tax provision of the State of Wisconsin essentially similar to that of the State of New York, the Court said:

> "Our income tax is a burden laid upon *the recipient of the income,* whether derived from real estate, personal property or labor, the amount of which is determined by the amount of the total net income derived from those sources, singly or combined."

The same Court in the case of *State* v. *Wisconsin Tax Commission,* 163 *N. W.*, 639, repeated this statement and said:

> *"It is the recipient of the income that is taxed,* not his property. * * * The tax is upon the right or ability to produce, create, receive and enjoy and not upon the specific property."

Further in the same case the Court declared:

> "But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon *the recipient of an income."*

It makes no difference under this law of New York whether the income is paid to the non-resident within that State or elsewhere. He is taxed by reason of the fact that he *earns* an income in New York and not by

reason of the fact that he *receives* his income there. There is absolutely nothing on which to base the imposition of the tax except the fact that the non-resident labors, carries on a business or occupation, or receives an income from property in New York. It is clear, therefore, that the tax is laid upon the right of laboring, doing business, or carrying on an occupation in that State. That a tax cannot be imposed upon this basis upon a non-resident seems, therefore, to be beyond question.

That the United States Government taxes the incomes of non-resident aliens from property or business within the United States is no justification for taxation by New York of income earned by a non-resident within the State.

The rights of citizens of one state to labor and do business in another state is quite different from the rights of aliens to do business in the United States. There is no constitutional restriction on the Federal Government in favor of aliens. There are constitutional restrictions upon the states in favor of citizens of other states.

It has never been authoritatively decided that the United States has power to tax the incomes of aliens not resident in this country.

In *Railroad Co.* v. *Collector,* 100 *U. S.,* 595, it was held that whether Congress, having power to enforce the law, has the authority to levy a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the Government no allegiance, is a question not necessary to the decision of the case.

It was urged in that case that the tax on the interest paid by corporations on their bonds held in London was a tax on the property of persons not subject to jurisdiction of the Government and, therefore, beyond the power of Congress to levy or enforce; but this Court held that such a tax was an *excise tax* on the business of railroad corporations laid upon their earnings.

In *United States* v. *Erie Railroad Co.,* 16 *Otto,* 327, a tax upon the income from bonds of the Railroad Company held by aliens, made payable by the Railroad Company, was held to be an excise tax. In the opinion of Mr. Justice Bradley in that case it is said:

> "The objection that Congress had no power to tax non-resident aliens is met by the fact that *the tax was not assessed against them personally,* but against the *rem,* the credit, the debt due to them."

Against even this, was the dissenting opinion of Mr. Justice Field, who, among other things, said:

> "There are limitations upon the powers of all governments without any express designation of them in their organic law; limitations which inhere in their very nature and structure, and this is one of them—that no rightful authority can be exercised by them over alien subjects, or citizens resident abroad or over their property there situated."

In that same opinion Mr. Justice Field quotes the language of Chief Justice Green of the Supreme Court of New Jersey in *State* v. *Ross,* 23 *N. J. L.,* 521:

> "A *personal tax* is the burden imposed by Government upon its own citizens for the benefits which that Government affords by its protection and its laws, and any Government which should attempt to impose such a tax upon the citizens of other states would justly incur the rebuke of the enlightened sentiment of the civilized world."

The distinction between the power of states and the power of the United States in matters of taxation is set forth in the opinion of Chief Justice White in *United States* v. *Bennett,* 232 *U. S.,* 299.

The principle of the cases affecting taxation by the states is approved, as expressed in the following statement:

"It is a settled rule of constitutional law that the power to tax depends upon *jurisdiction of the subject matter of the tax.* A long line of unbroken authority illustrates this firmly established doctrine in its various aspects and although the cases have all arisen under state tax laws, their reasoning is applicable to and controlling in the case of a Federal tax act."

Referring to the greater power of taxation possessed by the United States, it is said:

"It is co-extensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense."

And again:

"Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The very strong and able opinion of Judge Campbell (dissenting) in *Shaffer* v. *Howard,* 250 *Fed.,* 873-883, is especially called to the attention of the Court as containing a correct statement of the principles involved and a just and accurate discrimination of the difference between Federal taxation and State taxation.

The case of *Shaffer* v. *Howard* was appealed to this Court and pending argument it appeared that the term of office of the defendant officials had expired and that without authority of continuance of the cause of action,

the controversy had become moot, so that the main questions involved were not considered by this Court, and the cause was remanded with directions to dismiss the bill for want of proper parties. See memorandum opinion of Mr. Chief Justice White filed March 10, 1919.

For convenience, parts of Judge Campbell's interesting and persuasive opinion are printed in the appendix to this brief.

Counsel for appellant in their brief base their argument for the validity of the tax upon propositions which seem to disregard the recognized restrictions upon the taxing power of any state, to which we hereinbefore have referred.

On page 10 of their brief counsel for appellant say:

> "It really does not matter whether this tax be regarded (so far as non-residents are concerned) as direct or indirect, a tax on the person, on property, or on privilege. States can and do levy all three kinds. The only question is whether the State has *power* to enforce this tax, and its nature does not assist in determining that question. Whether or not sovereign power to enforce a tax exists, depends solely on the ability of the State to collect it without extending its jurisdiction beyond its territorial boundaries. * * * It can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out. *This inherent power in the sovereign extends equally to residents and to non-residents, to citizens and to aliens.* And the underlying reason for taxation, the support of the government in its protection of the lives, liberty and property of those having life, liberty or property within its borders, extends equally to residents and non-residents, citizens and aliens."

In the first two sentences of this quotation counsel consider a tax imposed on the person as distinguished from a tax on property and privilege, and then they argue that it does not matter whether this tax be regarded, so far as non-residents are concerned, as a tax on the person, on property or privilege, and that the sole question is whether the state *has power* to enforce this tax, and that its nature does not assist in determining that question; within the language of this argument, New York would have power to impose any tax imposed entirely upon the person of a citizen of New Jersey, if New York happened to have the power to enforce it by a levy upon property which the non-resident might have in New York.

In the case stated apparently no equivalent need be given by the state for the tax, and no thought need be given to the question whether or not it be discriminatory between residents and non-residents, if the sole criterion of the state's power to tax is its power to enforce it.

After the assertion of this proposition in appellant's brief, it is difficult for us to reconcile it with and to comprehend the assertion in their brief at page 11, as follows:

> "And the underlying reason for taxation: the support of the government in its protection of the lives, liberty and property of those having life, liberty or property within its borders, extends equally to residents and non-residents, citizens and aliens."

Sections 360 and 362 of the law, by allowing exemptions and deductions to residents which are not allowed to non-residents, violate Section 2 of Article IV and the Fourteenth Amendment of the Federal Constitution.

Upon that subject we deem it unnecessary to add to the thorough discussion of the subject by Judge Knox in his opinion in the Court below.

It is fitting that something should be said with refe
ence to the general policy of such a state income tax a
this.

The scheme of the Federal Constitution was to unit
the people of the various states in one Federal citizenshi
and to put an end to those local discriminations and in
positions by one state upon the citizens of another stat
which had so seriously impaired the efficiency of the Go
ernment under the Confederation.

As stated by this Court in *Paul* v. *Virginia*, 8 *Wall*
168, 180:

> "It was undoubtedly the object of the clause i
> question to place the citizens of each state upo
> the same footing with citizens of other States, s
> far as the advantages resulting from citizenship i
> those states are concerned. It relieves them fro
> the disabilities of alienage in other states; it in
> hibits discriminating legislation against them b
> other states; it gives them the right of free ingres
> into other states, and egress from them; it insures t
> them in other states the same freedom possessed b
> the citizens of those States in the acquisition an
> enjoyment of property and in the pursuit of happ
> ness; and it secures to them in other states th
> equal protection of their laws. It has been justl
> said that no provision in the Constitution ha
> tended so strongly to constitute the citizens of th
> United States one people as this."

The evils and inconveniences experienced under th
Constitution by reason of the efforts of one state to lev
taxes and imposts upon commerce between the states wa
removed by the interstate commerce clause of the Con
stitution.

To what extent the State of New York had gone in tha
particular direction and the unfortunate retaliation calle
forth by the States of New Jersey and Connecticut is in
terestingly described by Professor McMaster in his wor

"History of the People of the United States," Vol. 1, page 404.

I have printed in the appendix Professor McMaster's statement of this incident.

Similar unfortunate attempts by one state to levy their public contributions on citizens of other states are likely to be resorted to. It is most important that the scheme and policy of the Constitution be so interpreted as to prevent such efforts. It is easily conceivable that special income taxes might be laid by the State of New York upon persons doing business in New York City, not for state purposes, but for municipal purposes, in addition to income taxes for state purposes, thus imposing upon the citizens of Connecticut and New Jersey, and upon the citizens of all other states who do business in New York City, the burden of contributing to the enormous municipal expenses of that metropolis.

It is respectfully submitted that the statute in question violates the Constitution of the United States and should be declared null and void as against citizens of other States. The decree appealed from should be affirmed.

JOHN W. GRIGGS,
Counsel for the State of New Jersey
as *Amicus Curiae*.

APPENDIX.

Extracts from opinion of Judge Campbell in Shaffer v. Howard, 250 Fed., 885, etc.:

"From a reading of the Oklahoma income tax act, it is clear that, so far as it relates to residents of the state, the Legislature did not intend that it should be levied upon or have any relation or reference to property or the operations of any trade or business within the state; for, as to residents of the state, the tax is levied upon 'the entire net income of such persons arising or accruing from all sources,' including, of course, those without as well as those within the state; and it must be presumed that the Legislature well understood that they had no power to tax property or business operations outside of the state. A resident of the state is made subject to a tax upon his net income, even though all of it arises from property or activities without the state. Taxation and protection are reciprocal. The right to tax an individual results from the general protection afforded him and his property by the state. *Cooley on Taxation,* Vol. 1, p. 22. The resident of the state is subjected to the income tax for the protection the state affords his person, not his property or any right to do business in the state exercised by him; else it could not be made to extend to a resident who neither had property nor did business within the state, and by terms of the act it is a *like tax* which is attempted to be levied upon non-residents to the extent of their net income from property owned, and business, trade, or profession carried on in the state. * * *

"The Oklahoma income tax is clearly not a property tax in so far as it relates to residents of the state. As said by the Supreme Court of Wisconsin in relation to the income tax of that state, the income tax in this state, as applied to residents, does not seek to reach property or interest in property as such; it is a burden laid upon the recipient of the income. While conceding that this

income tax is not a property tax, nor a tax directly imposed upon any business, trade, or profession carried on by the non-resident, counsel for defendants insist that for 'jurisdictional purposes' the fact that the income subjected to the tax is derived from property or business within the state may be looked to. In their brief counsel for defendants say:

" 'Let us again here emphasize the fact that income has no relation to the property producing the same, nor to the business from which the same was produced, except for jurisdictional purposes alone; and this is not peculiar to income tax alone, but applies with equal force to other forms of taxation.'

"But this cannot be sound. In the first place, it will not do to say that this tax may be imposed upon residents of the state upon one theory, that is, the protection they receive in their persons, irrespective of situs of property or business activity, and upon non-residents, over whose persons the state has no jurisdiction, upon another theory, that the income arises from certain property or business enjoying the state's protection. If the tax is one pertaining solely to the person of the taxable, as we have seen is clearly the case in relation to residents, then it cannot be imposed upon non-residents, for they are not within the taxing power of the state so far as their persons are concerned. This was evidently in the minds of the legislators, and hence they attempted to bring their incomes within the state's jurisdiction to tax them by attempting to relate them to the sources within the state from which they might be derived. But this, while denominated an income tax, is in reality a tax upon the property or business producing the income, measured by the income. The basis of such tax must be the protection which the state affords the property or business, and no mere legislative nomenclature can make it other than a tax upon such property or business.

* * * * * * * *

"Keeping in mind that the taxing power of the state is limited to the three subjects—persons, property, and business—and that, as said by Justice Field in the case involving tax on foreign-held bonds, *supra,* whatever form taxation may assume, it must relate to one of these subjects, and keeping in mind also the inability of the state to subject to tax the person of a non-citizen as well as any property lying without the state, or any business transacted without the state, the tax under consideraion must have relation to the person, property, or business of the defendant. We have seen that as to citizens and residents of the state it clearly has relation to the person of the taxable as the recip'ent of the income, to the exclusion of any consideration of the source of such income, based upon the theory of the protection which the state affords him in his person as one of its citizens; but this theory fails when we come to consider non-citizens, for the state affords them no protection in their persons, and, being outside its territorial limits, it has no power or jurisdiction to impose upon them a tax purely personal in its nature. Nor does the fact that such non-citizen owns property or does business within the state empower the state to impose upon him a purely personal tax. It may tax such *property or business,* but it cannot, by calling such tax an income tax, change the nature of the tax. It would still be a property tax or an excise tax, according as it related to property or business. It is clear that the Legislature, realizing its inability to subject non-citizens to a tax purely personal in its nature, but desiring to bring them within the operation of its income tax law to the extent that their incomes are derived from property owned or business transacted within the state, has attempted to impose upon them what it styles an income tax, but which is essentially a property or excise tax, measured by the net income derived from specific property or business within the state. But the property and business of non-citizens, while properly subject to any existing tax legislation operating alike upon citizens and non-citizens, may not be

singled out and subjected to a tax which is not also imposed upon the property and business of citizens, merely because being that of non-citizens.

* * * * * * * *

"The tax under consideration is, as to citizens of Oklahoma, properly termed an income tax, because it is imposed upon them as a purely personal tax, measured by their incomes, in consideration for the protection which the state affords them in their persons, irrespective of the source of such income, or whether it be within or without the state, and the power of the state to levy such a tax upon its citizens is not questioned. But such a tax cannot reach citizens and residents of other states. In their persons they are only subject to the taxing power of the states of their domicile. If they acquire property or do business in this state, they may be taxed as to such property or *business* to the extent, and only to the extent, that citizens of this state are taxed on similar property or business. Provisions for such taxes are found in laws other than the income tax law now being considered, and they apply to citizens and non-citizens alike. To the taxes provided by these laws, so far as they exist, the property and business of the plaintiff within this state are subjected equally with the property and business within the state of all other persons, resident and non-resident. This being true, to subject the plaintiff to this so-called income tax, which, as we have seen, as applied to a non-resident, is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, is to deny to him the privileges and immunities of citizens of the state; for while by the same law a tax is imposed upon citizens of the state, it is, as we have seen, a purely personal tax, not in any true sense a tax upon their property or business, and a tax to which the state cannot subject the plaintiff, because, being a citizen and resident of another sovereign state, this state has no jurisdiction to tax him on his person. Whether he shall be subjected to such

personal income tax is a matter solely within the power of the state of his domicile to determine.

"While styled an income tax, the subject of this tax is the recipient of the income. The income merely affords the measure of tax. This is the dominant conception in all modern so-called income tax legislation by the several states, so far as relates to residents and citizens of the state. The situs of the source of the income is ignored. The power to tax rests in the jurisdiction exercised by the state over the person receiving the income, and that its jurisdiction may not extend to the property or business producing the income is considered immaterial. The attempt to combine with legislation providing for such a tax a provision for a so-called income tax subjecting the net incomes of non-residents upon property or business within the state, founded not upon jurisdiction of the person, but upon the fact that the situs of the property or business is within the state, cannot, in my judgment, be sustained. They are essentially separate and distinct provisions, relating to separate and distinct subjects of taxation, and the latter provision as to non-residents is in no wise strengthened because it is found coupled with the former. It is essentially a tax upon the property or business involved. In fact, it must be that, for it will not be contended that the state has the power to subject non-citizens to a *purely personal tax.* For the purpose of determining its validity, it must be considered as standing alone; and, of course, it will be conceded that an act imposing a tax upon the property or business owned or conducted within the state by non-residents, without imposing a like tax upon the property or business of residents, cannot be sustained.

"It is suggested that, because non-residents can come into Oklahoma and make fabulous profits from the exploitation of its great natural resources, it is desirable that the state furnishing such opportunities should, as a consideration therefor, be permitted to exact a return in taxation commensurate with the opportunities afforded:

and it is further suggested that, if these non-citizens cannot be taxed on their incomes as is sought to be done here, many operators who are now citizens and residents of the state will expatriate themselves, so as to avoid the income tax. But these are considerations which in no sense affect the legal questions involved. The Constitution of the United States has decreed that the natural resources of Oklahoma, however great, as well as those of every other state, are subject to development by all citizens of the United States alike, regardless of state lines, and citizens of other states may acquire property and do business here without subjecting themselves to liability for any purely personal taxes such as may be assessed against citizens and residents, and shall be subject to only such taxes on their property and business within the state as shall be levied upon similar property and business of citizens and residents of the state."

Extract from McMaster's "History of the People of the United States," Vol. I, page 404:

"The Legislature, in an evil hour, passed an act aimed full against the commerce of Connecticut and New Jersey. To supply the great city with firewood, vegetables, and fowls had long been a source of income to her neighbors, and a brisk trade had grown up. Early on the morning of every market-day the broad sheet of water that separated Paulus Hook from the city was dotted with shallops loaded to the water's edge with butter and cheese, turnips and carrots, with, in fine, all those varieties of vegetables and fruit for which the Dutch farms of New Jersey were even then famous. Every week there drew up at the docks vessels from Connecticut bringing hundreds of cords of the best firewood the market could supply. To such proportions had the business grown that it was commonly believed that several thousand pounds sterling were in this way drawn out of the city by the Jerseymen and Yankees. This trade the Assembly determined to crush,

and framed and passed an act the consequences of which were not foreseen. Every wood-boat, every shallop, every small sloop from New Jersey of more than twelve tons burden, it was decreed, should henceforth be entered and cleared at the Custom-House in the same manner as packets that came from London or any other foreign port. The moment the law went into operation the boatmen plying between New York and the northern shore of New Jersey cried out that they were ruined men; that almost the whole of their small profit was taken from them and put into the hard, griping hands of the officers of the customs at New York. To retaliate by raising the price demanded for their produce was impossible, for the increase would be so great that half the consumers would cease to buy.

"The Legislature at Trenton heard their cry, and resolved to be signally revenged. The corporation of the hated city was the owner of four acres of land on Sandy Hook, in the State of New Jersey. The plot had been purchased from the original proprietor for the purpose of maintaining upon it a light-house, a public inn, and a kitchen-garden. The light-house was already built, and on this was now laid a tax of thirty pounds a month.

"The restrictions placed on boats from Connecticut were much the same as on those from across the Hudson. The rate of dockage was raised, small sloops forced to pay an entrance-fee, and the carting of firewood across the city heavily taxed. No notice was taken by the Connecticut Assembly. But the business men at New London, whence most of the boats went out, were greatly incensed. It seemed, they declared, as if the time was at hand when, between the British Navigation Act, the lack of commercial treaties with continental powers, the Barbary xebecs, and the selfish policy of New York, there would not be a port on the face of the earth where an American vessel could trade. But they would see what could be done. They would strike back with all the power at their command, and flattered themselves they could

make the blow felt. A league was formed, and a paper passed about, which bound all who signed it, under penalty of fifty pounds to be collected by a civil process in any court of law, not to send into the State of New York any article whatever, nor to furnish any craft bound for that State with any kind of lading for one year from the twentieth of July, 1787. The agreement was faithfully kept. Yet little came of it. The supplies withheld by the New London merchants were obtained elsewhere, and, before the year specified in the agreement had passed, ten States had ratified the Constitution, and the power of New York to tax her neighbors was taken away forever."

TRAVIS, AS COMPTROLLER OF THE STATE OF NEW YORK, *v.* YALE & TOWNE MANUFACTURING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 548. Argued December 15, 16, 1919.—Decided March 1, 1920.

Shaffer v. *Carter*, *ante*, 37, followed, to the effect that a State may tax incomes of non-residents arising within her borders and that there is no unconstitutional discrimination against non-residents in confining the deductions allowed them for expenses, losses, etc., to such as are connected with income so arising while allowing residents, taxed on their income generally, to make such deductions without regard to locality. P. 75.

Such a tax may be enforced as to non-residents working within the State by requiring their employers to withhold and pay it from their salaries or wages; and no unconstitutional discrimination against such non-residents results from omitting such a requirement in the case of residents. P. 76.

A regulation requiring that the tax be thus withheld is not unreasonable as applied to a sister-state corporation carrying on local business without any contract limiting the regulatory power of the taxing State; nor is the power to impose such a regulation affected by the fact that the corporation may find it more convenient to pay its employees and keep its accounts in the State of its origin and principal place of business. *Id.*

The terms "resident" and "citizen" are not synonymous, but a general taxing scheme of a State which discriminates against all non-residents necessarily includes in the discrimination those who are citizens of other States. P. 78.

A general tax laid by a State on the incomes of residents and non-residents, which allows exemptions to the residents, with increases for married persons and for dependents, but allows no equivalent exemptions to non-residents, operates to abridge the privileges and immunities of citizens of other States, in violation of § 2 of Art. IV, of the Constitution. P. 79.

Held, that such a discrimination in the income tax law of New York is

not overcome by a provision excluding from the taxable income of non-residents annuities, interest and dividends not part of income from a local business, or occupation, etc., subject to the tax. P. 81.

An abridgment by one State of the privileges and immunities of the citizens of other States cannot be condoned by those States or cured by retaliation. P. 82.

262 Fed. Rep. 576, affirmed.

THE case is stated in the opinion.

Mr. James S. Y. Ivins and *Mr. Jerome L. Cheney*, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. E. C. Aiken* were on the brief, for appellant:

It might be argued that an income tax is *sui generis*—neither a tax on property, on a privilege, nor on the person—but a tax on the right to receive income (*Peck & Co.* v. *Lowe*, 247 U. S. 165); or it might be argued that it is a commutation tax or a composite tax. As a composite tax it might be said that in so far as it taxes the rent from real property it is a real property tax; in so far as it is a tax on the increased value of personalty, it is a personal property tax; in so far as it is a tax on the profits from the purchase and sale of property, it is an excise on sales or on commerce; in so far as it is a tax on income from trade, profession or labor, it is a privilege tax; and in so far as it taxes residents on income from sources without the territorial jurisdiction of the sovereign, it is a pure personal tax. The characterization of a tax by administrative officers, by the phraseology of the statute, or the opinion of other courts, is not controlling. This court will look only at the practical effect of the tax as it is enforced. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294.

It is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology, so far as both are taxed. In so far as the tax extends to income of residents from sources without the State,

there is no similar tax upon non-residents, but that is nothing for the latter to complain of. It really does not matter whether this tax be regarded (so far as non-residents are concerned) as direct or indirect, a tax on the person, on property, or on privilege. States can and do levy all three kinds. The only question is whether the State has power to enforce this tax, and its nature does not assist in determining that question.

Whether or not sovereign power to enforce a tax exists, depends solely on the ability of the State to collect it without extending its jurisdiction beyond its territorial boundaries. The sovereign can levy taxes on property which is tangible and within its boundaries, by its physical possession of that property. It can enforce taxes on privileges or rights, through preventing their exercise within its boundaries by those who do not pay. It can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out. This inherent power in the sovereign extends equally to residents and to non-residents, to citizens and to aliens. *Duer* v. *Small*, 4 Blatchf. 263. It exists in each of the States except as restricted by the Federal Constitution. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319.

With the exception of matters prohibited by the Constitution specifically (such as exports, or interstate commerce), or impliedly (such as the activities of the national government), there is no doubt of the right of the State to tax anything which is within its territorial jurisdiction. The only constitutional questions that ordinarily arise in respect to modern taxation are (1) those of the situs of intangibles, (2) those of the equal application of taxing statutes under Art. IV of Constitution and the Fourteenth Amendment, and (3) those of due process of law.

The question of the right to impose a tax on incomes of non-residents is not a question of the nature of the tax nor is it a question of whether income is property or

the acquisition of it a right or a privilege; but it is a question of the situs of the income. The doctrine that movable property follows the person for purposes of taxation has given way to the doctrine that where property has a situs, there it is taxable. *Bristol* v. *Washington County*, 177 U. S. 133.

The reason for regarding the situs of intangible property as the domicile of the person depends not on the meaning of property, but on the meaning of situs. That property is said to be taxable only at its situs is because where property is taxable—that is, wherever a sovereign can enforce a tax against it—there it has a situs. In determining whether income has a situs for purposes of taxation in a given State, we should begin, not by saying: "Where is its situs?" that we may determine whether it is taxable, but rather: "Can it be reached by taxation?" to determine whether it has a situs there. If it can be reached by taxation by a State—if the State can enforce a tax against it by due process of law—then it has a situs for taxation in that State. See *State Tax on Foreign-Held Bonds*, *supra; Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 355; *Blackstone* v. *Miller*, 188 U. S. 189; *New Orleans* v. *Stempel*, 175 U. S. 309; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388; *Rogers* v. *Hennepin County*, 240 U. S. 184, 191.

A person receives income in one of three ways: It is (1) the product of property, or the money realized by the sale of such product, (2) the profit gained in the purchase and sale of property, or (3) the compensation for personal service. In each of these cases the State has power to enforce its taxes equally against residents and against non-residents.

The New York law does not deny to citizens of any State any of the privileges or immunities of citizens of the several States. Citizens of other States, as citizens, and only as such, are protected by Art. IV, § 2, cl. 1. So, if there is no discrimination against them as citizens, the provision is not violated. Distinctions are drawn between residents and non-residents, but this is regardless of citizenship—non-resident citizens of New York are treated like all other non-residents, and citizens of other sovereigns who are resident in New York are treated exactly like resident citizens. The term "reside" in the Fourteenth Amendment probably means to "be domiciled"; or to "maintain a voting residence." It does not mean to "have a place of abode,"—especially if one has several places of abode.

The terms resident and citizen are not normally synonymous and are not rendered exclusively so by the use in the Fourteenth Amendment of the word "resident" in one of its many meanings. *La Tourette* v. *McMaster*, 248 U. S. 465, 470. It is settled that where residence is a proper basis for classification, the adoption of such basis is not violative of Art. IV, § 2, cl. 1. *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Frost* v. *Brisbin*, 19 Wend. 11; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72, 76; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84; *Blake* v. *McClung*, 172 U. S. 239, 256, 257.

Classification in taxation is a proper exercise of legislative power. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; *Barrett* v. *Indiana*, 229 U. S. 26, 29–30; *Giozza* v. *Tiernan*, 148 U. S. 657, 662.

This classification may discriminate between classes in rates of taxation, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245; or in exemptions from taxation,

Beers v. *Glynn*, 211 U. S. 477; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329. A taxing statute is not invalid because of simple inequality between classes. *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210. It would seem that the only restriction on the power of classification is that there must be real differences between the situations of the different classes. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 138. What constitutes a real difference depends upon the purpose and extent of the legislation and all the circumstances of the subjects and objects thereof. *Tanner* v. *Little*, 240 U. S. 369, 382, 383.

The classification of residents and non-residents by the New York law is reasonable. *La Tourette* v. *McMaster, supra; Northwestern Mutual Life Ins. Co.* v. *Wisconsin, supra. Travellers' Ins. Co.* v. *Connecticut, supra*, is directly in point.

If the power to levy a tax exists, the rate fixed will not render it unconstitutional. *Tanner* v. *Little, supra.* The power to exempt certain things to the exclusion of others follows the same rules as the power to tax certain things, to the exclusion of others—it is only another way of stating the same proposition. And if the rate is immaterial in determining constitutionality as to taxation, so the rate of exemption is immaterial.

The different methods of collection provided by the statute for the tax on income received by way of compensation for personal services by residents and by non-residents, does not deprive any person of the equal protection of laws. *St. John* v. *New York*, 201 U. S. 633, 637. There are many decided cases in which different methods of procedure against residents and against non-residents have been upheld. *Tappan* v. *Merchants' National Bank, supra*, 505; *District of Columbia* v. *Brooke*, 214 U. S. 138; *Central Loan & Trust Co.* v. *Campbell Commission Co.*,

supra, 84, 97, 98. Many statutes taxing corporate shares and requiring the corporation to withhold at the source against non-residents but not against residents have been upheld. *Travellers' Ins. Co.* v. *Connecticut*, *supra*; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, 463.

The law does not deny due process of law; violate the commerce clause; or impair the obligation of contracts.

Mr. Louis H. Porter and *Mr. Archibald Cox* for appellee:

The appellee's factory and principal place of business is in Connecticut. It is authorized to do business in New York and owns property there, but it is a citizen and resident of Connecticut; and the statute, of course, applies equally to an individual in its position. It employs sundry persons, including citizens and residents of Connecticut and New Jersey, to work for it, and has contracted to pay them definite salaries for their services. These salaries are paid in different ways, in some instances by checks mailed from the office in Connecticut to the employees outside the State of New York, if that is material. And they are in accordance with contracts of employment entered into before the enactment of the law. The statute seeks to impose on the appellee a personal liability as the means of compelling it to obey.

The invalidity of the provisions for withholding the tax from the salaries seems to be directly established by *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628.

A corporation, by securing authority to transact business within a State, does not thereby bring within the jurisdiction of that State transactions and properties wholly outside. It is not a matter of convenient collection, but a matter of jurisdiction. Distinguishing: *Hatch* v. *Reardon*, 204 U. S. 152; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461; *Travellers' Ins. Co.*

v. *Connecticut*, 185 U. S. 364; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443.

To determine the constitutionality of this tax, it is accordingly necessary to ascertain, not colloquially but from a jurisdictional standpoint, what is taxed, and whether that is within the jurisdiction of the State of New York.

The tax is a subjective tax imposing personal liability upon the person receiving the "net income" which merely measures the burden imposed on the taxpayer *in personam*. *Brady* v. *Anderson*, 240 Fed. Rep. 665; *State ex rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commission*, 166 Wisconsin, 287; *Income Tax Cases*, 148 Wisconsin, 456.

The liability is measured with reference to the net balance. And that net, from the year's experience, is used only as a measure of the general financial condition of the individual and his personal liability to pay from any resources he can control.

Even the amount of the tax varies according to the person of the recipient, and is not based upon the property or amount thereof. Thus, if the amount of income is twenty thousand dollars, it is taxed at one rate when received by one person, at another rate when received by two persons, and it is free from tax when received by twenty persons. This tax is not even measured strictly by the amount of income which a person receives. It is measured with a view to securing equality of sacrifice among taxpayers. *Income Tax Cases*, 148 Wisconsin, 456. And that the tax is personal is confirmed by the provisions for its collection, none of which sound *in rem* and all of which impose personal liability. That a tax with respect to "net incomes" is a personal tax, from the point of view of jurisdiction similar to a poll tax, is well indicated in *Maguire* v. *Tax Commissioner*, 230 Massachusetts, 503. Individual income as such, dissociated from the person of the owner, has no existence and is a purely fanciful conception.

A statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is a taking of property without due process of law. *United States* v. *Erie Ry. Co.*, 106 U. S. 327; *Railroad Co.* v. *Collector*, 100 U. S. 595; *Dewey* v. *Des Moines*, 173 U. S. 193; *City of New York* v. *McLean*, 170 N. Y. 374; *Barhyte* v. *Shepard*, 35 N. Y. 237. The text writers are unanimous in this limitation on the taxing power of the States. Cooley, Taxation, 3d ed., p. 24; Brown, Jurisdiction of Courts, 2d ed., pp. 549, 550. See *State* v. *Ross*, 23 N. J. L. 517, 521. The source of the income does not in any respect change the nature and character of the tax imposed upon the recipient, and it is as much beyond the power of the State to impose such a personal tax upon a non-resident as it is to impose a capitation tax on him. If the State has not jurisdiction to impose a personal liability for tax on a non-resident, it is immaterial whether that non-resident is engaging in an occupation in the State from which he derives a large income or not. So, also if the State has the jurisdiction to impose a tax, it is immaterial whether the non-resident's occupation in the State is gainful in money or in health or in pleasure. The State either has or has not the jurisdiction to impose a personal liability against a non-resident for the payment of taxes. The situation here presented in its inevitable effect upon the integrity of the Union is of the same character as that considered by this court in *Crandall* v. *Nevada*, 6 Wall. 35. See *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

The argument that it is fair that a citizen of Connecticut earning his income in New York should pay a tax to that State for the protection afforded him therein is political and legislative rather than judicial. If this argument can be properly considered by the court, it must be weighed against the mischievous effects upon the integrity of the Union and from this standpoint the tax in question would

seem inconsistent with the very spirit of the Constitution. The provisions of the statute here cannot be sustained as a tax on property.

A "net income" under this statute is but a measure of the condition of the person receiving and enjoying it. A debt of ten thousand dollars may be paid to one person or to ten, but remains a fixed measurable amount. Ten thousand dollars paid in gross salaries means nothing as to the net income of the recipients without consideration of their number and personality. Ten thousand dollars in salaries paid to a number of recipients may after the computation yield an aggregate of net incomes entirely different from that which it yields if paid to one. The personal condition of the recipient, and not the amount or character of the payment made, constitutes and determines the fact of net income. It seems, therefore, impossible to conceive a net income for purposes of this taxation separate and distinct from the person receiving it.

The laws of New York do not create, give validity to, or affect, the income of appellee's non-resident employees. They are employed and paid in Connecticut, whose laws govern the contract of employment and whose courts enforce the contract. The services rendered are not income. The services are performed in whole or in part in New York. The net income never has any existence in New York. The gross salary here is not owing by, or to, anyone in New York. The fact that the appellee can legally transact business in New York obviously makes no difference in the situs of the obligation.

Moreover, property to be taxable in a State must have some permanency there, and not be merely temporarily within the State. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409; *Buck* v. *Beach*, 206 U. S. 392; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

In each of those cases such as *Tappan* v. *Merchants' National Bank*, 10 Wall. 490, where a tax has been sus-

tained on property of a non-resident, there were present two factors which have been universally recognized as essential to jurisdiction—(1) some definite and specific property in existence, (2) having in a real sense a situs in the taxing State. *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Board of Assessors* v. *New York Life Ins. Co.*, 216 U. S. 517; *Hawley* v. *Malden*, 232 U. S. 1; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63.

The cases in which the courts have held that choses in action may acquire a situs different from the residence of the owner are not in point. A chose in action has not yet been paid. The debtor has only promised to pay it, and its value depends on the promise of the debtor. The actual money to pay the chose in action is in the State where he resides. Furthermore, the income tax is not assessed upon all money that comes to the recipient. It is only after the net amount has been determined after deducting from the gross receipts certain allowable expenses by way of deductions that the taxable amount is determined. Before that amount is determined and before any assessment can be laid thereon, most of the income, both gross and net, has been expended. The theory of a property tax is that it is a lien on the property taxed. Obviously the State cannot lawfully impose a tax lien upon property which is not itself in existence. The proposition is necessarily a contradiction in terms. *De Ganay* v. *Lederer*, 250 U. S. 376, distinguished.

The distinction between a tax on the income from property and a tax on the income from occupations and professions was clearly pointed out in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 635, 637. The distinction between the rights of the citizens of the several States, which are assured by the Constitution, and those of foreigners, who may be completely excluded from the United States, is pointed out in *United States* v. *Bennett*,

232 U. S. 299, and more specifically in *Railroad Co.* v. *Collector, supra.*

The provisions of the statute taxing non-residents cannot be sustained as imposing a privilege or license tax; nor on the theory that the State of New York has in fact power to collect the tax. It is not going too far to say that in every case in which this court has held unconstitutional a state law imposing a tax on persons or property outside its jurisdiction, the State had power to enforce the tax, because otherwise the case would not have been brought. *Board of Assessors* v. *New York Life Ins. Co., supra; New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania, supra; Morgan* v. *Parham,* 16 Wall. 471; *Louisville &c. Ferry Co.* v. *Kentucky,* 188 U. S. 385.

As between nations, the proposition that power to collect is the test of right to tax may be correct. Just as foreigners may be completely excluded from the United States (*United States* v. *Bennett, supra*), so anything that the United States can in fact seize it may perhaps tax. But the power of the individual States of the Union is limited by the Federal Constitution.

The tax on non-residents cannot be sustained on any theory that the State of New York protects their net income.

The provisions of the statute taxing non-residents are unconstitutional because they discriminate against citizens and residents of Connecticut and New Jersey. A materially higher tax is imposed on non-residents than upon residents.

The provisions operating to discriminate against appellee's non-resident employees conflict with § 2 of Art. IV of the Constitution and the privileges and immunities clause of the Fourteenth Amendment. A statute which in fact operates to defeat rights secured by the Constitution cannot be justified by invoking

the necessity of classification in taxation or by the fact that the words of the Constitution do not appear in the statute. *Chalker* v. *Birmingham & Northwestern Ry. Co.*, 249 U. S. 522.

There is no relevancy in cases where the State is dealing with a privilege which it may grant or withhold, such as those relating to foreign corporations doing business in the State, or succession taxes, or the nation's treatment of foreigners, because they do not deal with discrimination against persons having rights secured by the Constitution. *La Tourette* v. *McMaster*, 248 U. S. 465; *People* v. *Weaver*, 100 U. S. 539; *Sprague* v. *Fletcher*, 69 Vermont, 69.

Mr. John W. Griggs, by leave of court, filed a brief as *amicus curiæ.*

Mr. Laurence Arnold Tanzer, Mr. William P. Burr, Mr. William S. Rann and *Mr. William J. Wallin*, by leave of court, filed a brief as *amici curiae.*

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity, brought in the District Court by appellee against appellant as Comptroller of the State of New York to obtain an injunction restraining the enforcement of the Income Tax Law of that State (c. 627, Laws 1919) as against complainant, upon the ground of its repugnance to the Constitution of the United States because violating the interstate commerce clause, impairing the obligation of contracts, depriving citizens of the States of Connecticut and New Jersey employed by complainant of the privileges and immunities enjoyed by citizens of the State of New York, depriving complainant and its non-resident employees of their

property without due process of law, and denying to such employees the equal protection of the laws. A motion to dismiss the bill—equivalent to a demurrer—was denied upon the ground that the act violated § 2 of Art. IV of the Constitution by discriminating against non-residents in the exemptions allowed from taxable income; an answer was filed, raising no question of fact; in due course there was a final decree in favor of complainant; and defendant took an appeal to this court under § 238, Judicial Code.

The act (§ 351) imposes an annual tax upon every resident of the State with respect to his net income as defined in the act, at specified rates, and provides also: "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state." Section 359 defines gross income, and contains this paragraph: "3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article." In § 360 provision is made for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.; but, by paragraph 11 of the same section, "In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; . . ." By

§ 362, certain exemptions are allowed to any resident individual taxpayer, viz., in the case of a single person a personal exemption of $1,000, in the case of the head of a family or a married person living with husband or wife, $2,000; and $200 additional for each dependent person under 18 years of age or mentally or physically defective. The next section reads as follows: "§ 363. Credit for taxes in case of taxpayers other than residents of the state. Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws." Section 366 in terms requires that every "withholding agent" (including employers) shall deduct and withhold 2 per centum from all salaries, wages, etc., payable to non-residents, where the amount paid to any individual equals or exceeds $1,000 in the year, and shall pay the tax to the Comptroller. This applies to a resident employee, also, unless he files a certificate showing his residence address within the State.

Complainant, a Connecticut corporation doing business in New York and elsewhere, has employees who are residents some of Connecticut others of New Jersey but are occupied in whole or in part in complainant's business in New York. Many of them have annual salaries or fixed compensation exceeding $1,000 per year, and the

amount required by the act to be withheld by complainant from the salaries of such non-resident employees is in excess of $3,000 per year. Most of these persons are engaged under term contracts calling for stipulated wages or salaries for a specified period.

The bill sets up that defendant, as Comptroller of the State of New York, threatens to enforce the provisions of the statute against complainant, requires it to deduct and withhold from the salaries and wages payable to its employees residing in Connecticut or New Jersey and citizens of those States respectively, engaged in whole or in part in complainant's business in the State of New York, the taxes provided in the statute, and threatens to enforce against complainant the penalties provided by the act if it fails to do so; that the act is unconstitutional for the reasons above specified; and that if complainant does withhold the taxes as required it will be subjected to many actions by its employees for reimbursement of the sums so withheld. No question is made about complainant's right to resort to equity for relief; hence we come at once to the constitutional questions.

That the State of New York has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the State, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent); and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled by our decision in *Shaffer* v. *Carter*, this day announced, *ante*, 37, involving the income tax law of the State of Oklahoma. That there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are

connected with income arising from sources within the taxing State, likewise is settled by that decision.

It is not here asserted that the tax is a burden upon interstate commerce; the point having been abandoned in this court.

The contention that an unconstitutional discrimination against non-citizens arises out of the provision of § 366 confining the withholding at source to the income of non-residents is unsubstantial. That provision does not in any wise increase the burden of the tax upon non-residents, but merely recognizes the fact that as to them the State imposes no personal liability, and hence adopts a convenient substitute for it. See *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 239.

Nor has complainant on its own account any just ground of complaint by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfill the duty of deducting and withholding the tax. This cannot be deemed an unreasonable regulation of its conduct of business in New York. *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628, cited in behalf of complainant, is not in point. In that case the State of Pennsylvania granted to a railroad company organized under the laws of New York and having its principal place of business in that State the right to construct a portion of its road through Pennsylvania, upon prescribed terms which were assented to and complied with by the company and were deemed to constitute a contract, not subject to impairment or modification through subsequent legislation by the State of Pennsylvania except to the extent of establishing reasonable regulations touching the management of the business done and the property owned by the company in that State, not materially interfering with or obstructing the substantial enjoyment of the rights previously granted. Afterwards, Pennsylvania undertook by statute to re-

quire the company, when making payment of coupons upon bonds previously issued by it, payable at its office in the City of New York, to withhold taxes assessed by the State of Pennsylvania against residents of that State because of ownership of such bonds. The coupons were payable to bearer, and when they were presented for payment it was practically impossible for the company to ascertain who were the real owners, or whether they were owned by the same parties who owned the bonds. The statute was held to be an unreasonable regulation and hence to amount to an impairment of the obligation of the contract.

In the case at bar complainant, although it is a Connecticut corporation and has its principal place of business in that State, is exercising the privilege of carrying on business in the State of New York without any contract limiting the State's power of regulation. The taxes required to be withheld are payable with respect to that portion only of the salaries of its employees which is earned within the State of New York. It might pay such salaries, or this portion of them, at its place of business in New York; and the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the State of New York of the right to impose such a regulation. It is true complainant asserts that the act impairs the obligation of contracts between it and its employees; but there is no averment that any such contract made before the passage of the act required the wages or salaries to be paid in the State of Connecticut, or contained other provisions in anywise conflicting with the requirement of withholding.

The District Court, not passing upon the above questions, held that the act, in granting to residents exemptions denied to non-residents, violated the provision of § 2 of Art. IV of the Federal Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"; and, notwithstand-

ing the elaborate and ingenious argument submitted by appellant to the contrary, we are constrained to affirm the ruling.

The purpose of the provision came under consideration in *Paul* v. *Virginia*, 8 Wall. 168, 180, where the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." And in *Ward* v. *Maryland*, 12 Wall. 418, holding a discriminatory state tax upon non-resident traders to be void, the court, by Mr. Justice Clifford, said (p. 430): "Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

Of course the terms "resident" and "citizen" are not synonymous, and in some cases the distinction is important

(*La Tourette* v. *McMaster*, 248 U. S. 465, 470); but a general taxing scheme such as the one under consideration, if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. In *Blake* v. *McClung*, 172 U. S. 239, 247; 176 U. S. 59, 67, the court held that a statute of Tennessee, declaring the terms upon which a foreign corporation might carry on business and hold property in that State, which gave to its creditors residing in Tennessee priority over all creditors residing elsewhere, without special reference to whether they were citizens or not, must be regarded as contravening the "privileges and immunities" clause.

The nature and effect of the crucial discrimination in the present case are manifest. Section 362, in the case of residents, exempts from taxation $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent. A non-resident taxpayer has no similar exemption; but by § 363, if liable to an income tax in his own State, including income derived from sources within New York and subject to taxation under this act, he is entitled to a credit upon the income tax otherwise payable to the State of New York by the same proportion of the tax payable to the State of his residence as his income subject to taxation by the New York Act bears to his entire income taxed in his own State; "provided that such credit shall be allowed only if the laws of said state . . . grant a substantially similar credit to residents of this state subject to income tax under such laws." [1]

[1] Reading the statute literally, there would appear to be an additional discrimination against non-residents in that under § 366 the "withholding agent" (employer) is required to withhold 2 per cent. from all salaries, wages, etc., payable to any individual non-resident

In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which States has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those States, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity, due to the geographical situation of that city, in close proximity to the neighboring States, many thousands of men and women, residents and citizens of those States, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the State of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see *Amoskeag*

amounting to $1,000 or more in the year; whereas by § 351 the tax upon residents (indeed, upon non-residents likewise, so far as this section goes), is only one per centum upon the first $10,000 of net income. It is said, however, that the discrepancy arose through an amendment made to § 351 while the bill was pending in the legislature, no corresponding amendment having been made in § 366. In view of this, and taking the whole of the act together, the Attorney General has advised the Comptroller that § 366 requires withholding of only one per centum upon the first $10,000 of income. And the Comptroller has issued regulations to that effect. Hence we treat the discrepancy as if it did not exist.

Savings Bank v. *Purdy*, 231 U. S. 373, 393–394; *Maxwell* v. *Bugbee*, 250 U. S. 525, 543); but a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State.

It cannot be deemed to be counterbalanced by the provision of par. 3 of § 359 which excludes from the income of non-resident taxpayers "annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article." This provision is not so conditioned as probably to benefit non-residents to a degree corresponding to the discrimination against them; it seems to have been designed rather (as is avowed in appellant's brief) to preserve the preëminence of New York City as a financial center.

Nor can the discrimination be upheld, as is attempted to be done, upon the theory that non-residents have untaxed income derived from sources in their home States or elsewhere outside of the State of New York, corresponding to the amount upon which residents of that State are exempt from taxation under this act. The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that non-residents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them.

In the brief submitted by the Attorney General of New York in behalf of appellant, it is said that the framers of the act, in embodying in it the provision for unequal treatment of the residents of other States with

respect to the exemptions, looked forward to the speedy adoption of an income tax by the adjoining States; in which event, injustice to their citizens on the part of New York could be avoided by providing similar exemptions similarly conditioned. This, however, is wholly speculative; New York has no authority to legislate for the adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situation. But besides, in view of the provisions of the Constitution of the United States, a discrimination by the State of New York against the citizens of adjoining States would not be cured were those States to establish like discriminations against citizens of the State of New York. A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Decree affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.